

**HEARING ON THE
“SEARCHING FOR AND CUTTING REGULATIONS
THAT ARE UNNECESSARILY BURDENSOME
(SCRUB) ACT OF 2014”**

HEARING
BEFORE THE
SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED THIRTEENTH CONGRESS
SECOND SESSION

—
FEBRUARY 11, 2014
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**HEARING ON THE
“SEARCHING FOR AND CUTTING
REGULATIONS THAT ARE UNNECESSARILY
BURDENSOME (SCRUB) ACT OF 2014”**

TUESDAY, FEBRUARY 11, 2014

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 1:03 p.m., in room 2141, Rayburn Office Building, the Honorable Spencer Bachus (Chairman of the Subcommittee) presiding.

Present: Representatives Bachus, Goodlatte, Farenthold, Issa, Marino, Holding, Collins, Smith of Missouri, Johnson, Conyers, DelBene, Garcia, Jeffries, and Cicilline.

Staff present: (Majority) Daniel Flores, Subcommittee Chief Counsel; Ashley Lewis, Clerk; Justin Sok, Legislative Assistant for Rep. Smith of Missouri; Philip Swartzfager, Legislative Director for Rep. Bachus; Jonathan Nabavi, Legislative Director for Rep. Holding; Mike Geiselhart, Intern; (Minority) Perry Apfelbaum, Staff Director & Chief Counsel; Susan Jensen, Counsel; Slade Bond, Counsel for Rep. Johnson; and Rosalind Jackson, Professional Staff Member.

Mr. BACHUS. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law hearing will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

Our Subcommittee hearing today is being held to examine old and outdated Federal regulations that are a barrier to the new job creation that we so badly need in our country. Let me commend Congressman Jason Smith from Missouri for the work he has been doing on this issue and for legislation he will soon be introducing, The Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014, for short, the SCRUB Act.

This Subcommittee has heard testimony which has made a compelling case that Federal agencies do not properly account for input from small businesses and too often ignore the cost associated with new regulations.

Today we consider an even larger problem. What happens to all those regulations passed long ago that no longer serve a useful pur-

pose or no longer provide a benefit? Ronald Reagan once said nothing lasts longer than a temporary Federal program. He could have added Federal regulations to that. Nothing lasts longer than Federal regulations.

No one who has studied the regulatory structure in this country would dispute that there are a lot of outdated Federal regulations on the book that no longer pass a cost-benefit test and in some cases no longer make sense. Employers spend time, money, and resources complying with antiquated regulations that could be better spent on hiring more workers or reinvesting in their enterprises.

The total Federal regulatory burden has reached \$1.75 trillion to \$1.8 trillion by some estimates. If we remove just part of this burden, we would see immediate economic growth.

The SCRUB Act establishes a systematic process for doing this. It would set up a BRAC-style commission to identify regulations that have been rendered obsolete by technology and the markets, that have achieved their goals, or that are duplicative or conflict with other Federal regulations. The commission's recommendations to eliminate those unnecessary regulations would have to be implemented by agencies unless disapproved by a joint resolution of Congress.

There is a role for Federal regulations that provides reasonable and clear rules of the road for businesses that provide benefits to the public that are greater than the costs. But we should acknowledge the unneeded burden that redundant and obsolete regulations place on job creation and our economy.

Accordingly, I look forward to today's testimony.

At this time, I will recognize our new Ranking Member, Hank Johnson of Georgia, for his opening statement. We would like to say welcome as the new Subcommittee Chair to your position. So you are recognized for your opening statement, Mr. Johnson.

[Discussion Draft of H.R. _____, the "Searching for and Cutting Regulations that are Unnecessarily Burdensome (SCRUB) Act of 2014"³ follows:]

[DISCUSSION DRAFT]

113TH CONGRESS
2D SESSION**H. R.** _____

To provide for the establishment of a process for the review of rules and
sets of rules, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. SMITH of Missouri introduced the following bill; which was referred to the
Committee on _____

A BILL

To provide for the establishment of a process for the review
of rules and sets of rules, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Searching for and Cut-
5 ting Regulations that are Unnecessarily Burdensome Act
6 of 2014” or as the “SCRUB Act of 2014”.

7 **SEC. 2. TABLE OF CONTENTS.**

Sec. 1. Short title.

Sec. 2. Table of contents.

TITLE I—RETROSPECTIVE REGULATORY REVIEW COMMISSION

Sec. 101. In general.

TITLE II—REGULATORY CUT-GO

Sec. 201. Cut-go procedures.

Sec. 202. Applicability.

Sec. 203. Congressional approval of rules lacking required agency offsets.

“Sec. 809. Cut-go rules.

Sec. 204. OIRA certification of cost-benefit calculations.

TITLE III—RETROSPECTIVE REVIEW OF NEW RULES

Sec. 301. Plan for future review.

TITLE IV—JUDICIAL REVIEW

Sec. 401. Judicial review.

TITLE V—MISCELLANEOUS PROVISIONS

Sec. 501. Definitions.

Sec. 502. Effective date.

1 **TITLE I—RETROSPECTIVE REGU-** 2 **LATORY REVIEW COMMIS-** 3 **SION**

4 **SEC. 101. IN GENERAL.**

5 (a) ESTABLISHMENT.—There is established a com-
6 mission, to be known as the Retrospective Regulatory Re-
7 view Commission, that shall review rules and sets of rules
8 in accordance with specified criteria to determine if a rule
9 or set of rules should be repealed or amended to eliminate
10 or reduce the costs of regulation to the economy. The
11 Commission shall terminate on the date that is 3 years
12 after the date of the appointment of the ninth member
13 of the Commission.

14 (b) MEMBERSHIP.—

15 (1) NUMBER.—The Commission shall be com-
16 posed of 9 members who shall be appointed not later

1 than 180 days after the date of enactment of this
2 Act.

3 (2) TERM.—The term of each member shall be
4 3 years, beginning on the date that is 180 days after
5 the date of enactment of this Act.

6 (3) APPOINTMENT.—The members of the Com-
7 mission shall be appointed as follows:

8 (A) The President shall appoint the chair
9 of the Commission from among past Adminis-
10 trators of the Office of Information and Regu-
11 latory Affairs, past chairmen of the Administra-
12 tive Conference of the United States, and other
13 candidates of similar expertise and experience
14 in rule making affairs and the administration of
15 regulatory reviews.

16 (B) The Speaker of the House of Rep-
17 resentatives, the Minority Leader of the House
18 of Representatives, the Majority Leader of the
19 Senate, and the Minority Leader of the Senate
20 shall each appoint 2 members of the Commis-
21 sion.

22 (c) POWERS AND AUTHORITIES OF THE COMMIS-
23 SION.—

24 (1) MEETINGS.—The Commission may meet
25 when, where, and as often as the Commission deter-

1 mines appropriate, except that the Commission shall
2 hold public meetings not less than twice each year.

3 (2) HEARINGS.—In addition to meetings held
4 under paragraph (1), the Commission may hold
5 hearings to consider issues of fact or law relevant to
6 the Commission's work. Any hearing held by the
7 Commission shall be in public.

8 (3) ACCESS TO INFORMATION.—The Commis-
9 sion may secure directly from any department or
10 agency of the United States information necessary
11 to enable it to carry out this Act. Upon request of
12 the chair of the Commission, the head of that de-
13 partment or agency shall furnish that information to
14 the Commission.

15 (4) SUBPOENAS.—

16 (A) IN GENERAL.—The Commission may
17 issue subpoenas requiring the attendance and
18 testimony of witnesses and the production of
19 any evidence relating to the duties of the Com-
20 mission. The attendance of witnesses and the
21 production of evidence may be required from
22 any place within the United States at any des-
23 ignated place of hearing within the United
24 States.

1 (B) FAILURE TO OBEY A SUBPOENA.—If a
2 person refuses to obey a subpoena issued under
3 subparagraph (a), the Commission may apply
4 to a United States district court for an order
5 requiring that person to appear before the Com-
6 mission to give testimony, produce evidence, or
7 both, relating to the matter under investigation.
8 The application may be made within the judicial
9 district where the hearing is conducted or where
10 that person is found, resides, or transacts busi-
11 ness. Any failure to obey the order of the court
12 may be punished by the court as civil contempt.

13 (C) SERVICE OF SUBPOENAS.—The sub-
14 poenas of the Commission shall be served in the
15 manner provided for subpoenas issued by a
16 United States district court under the Federal
17 Rules of Civil Procedure for the United States
18 district courts.

19 (D) SERVICE OF PROCESS.—All process of
20 any court to which application is made under
21 paragraph (2) may be served in the judicial dis-
22 trict in which the person required to be served
23 resides or may be found.

24 (d) PAY AND TRAVEL EXPENSES.—

25 (1) PAY.—

1 (A) MEMBERS.—Each member, other than
2 the chair, shall be paid at a rate equal to the
3 daily equivalent of the minimum annual rate of
4 basic pay payable for level IV of the Executive
5 Schedule under section 5315 of title 5, United
6 States Code, for each day (including travel
7 time) during which the member is engaged in
8 the actual performance of duties vested in the
9 Commission.

10 (B) CHAIR.—The chair shall be paid for
11 each day referred to in subparagraph (A) at a
12 rate equal to the daily equivalent of the min-
13 imum annual rate of basic pay payable for level
14 III of the Executive Schedule under section
15 5314 of title 5, United States Code.

16 (2) TRAVEL EXPENSES.—Members shall receive
17 travel expenses, including per diem in lieu of subsist-
18 ence, in accordance with sections 5702 and 5703 of
19 title 5, United States Code.

20 (e) DIRECTOR OF STAFF.—

21 (1) IN GENERAL.—The Commission shall ap-
22 point a Director.

23 (2) PAY.—The Director shall be paid at the
24 rate of basic pay payable for level IV of the Execu-

1 tive Schedule under section 5315 of title 5, United
2 States Code.

3 (f) STAFF.—

4 (1) IN GENERAL.—Subject to paragraph (2),
5 the Director, with the approval of the Commission,
6 may appoint and fix the pay of additional personnel
7 from the public and private sectors.

8 (2) LIMITATIONS ON APPOINTMENT.—The Di-
9 rector may make such appointments without regard
10 to the provisions of title 5, United States Code, gov-
11 erning appointments in the competitive service, and
12 any personnel so appointed may be paid without re-
13 gard to the provisions of chapter 51 and subchapter
14 III of chapter 53 of that title relating to classifica-
15 tion and General Schedule pay rates, except that an
16 individual so appointed may not receive pay in ex-
17 cess of the annual rate of basic pay payable for GS-
18 18 of the General Schedule.

19 (3) AGENCY ASSISTANCE.—Following consulta-
20 tion with and upon request of the Director, the head
21 of any Federal department or agency shall detail any
22 of the personnel of that department or agency to the
23 Commission to assist the Commission in carrying
24 out its duties under this Act.

1 (4) GAO AND OIRA ASSISTANCE.—The Comp-
2 troller General of the United States and the Admin-
3 istrator of the Office of Information and Regulatory
4 Affairs shall provide assistance, including the detail-
5 ing of employees, to the Commission in accordance
6 with an agreement entered into with the Commis-
7 sion.

8 (5) ASSISTANCE FROM OTHER PARTIES.—Con-
9 gress, the States, municipalities, Federally recog-
10 nized Indian tribes, and local governments may pro-
11 vide assistance, including the detailing of employees,
12 to the Commission in accordance with an agreement
13 entered into with the Commission

14 (g) OTHER AUTHORITY.—

15 (1) EXPERTS AND CONSULTANTS.—The Com-
16 mission may procure by contract, to the extent funds
17 are available, the temporary or intermittent services
18 of experts or consultants pursuant to section 3109
19 of title 5, United States Code.

20 (2) PROPERTY.—The Commission may lease
21 space and acquire personal property to the extent
22 funds are available.

23 (h) DUTIES OF THE COMMISSION.—

24 (1) IN GENERAL.—The Commission shall con-
25 duct a review of the Code of Federal Regulations to

1 identify rules and sets of rules that collectively im-
2 plement a regulatory program that should be re-
3 pealed or amended.

4 (2) NATURE OF REVIEW.—To identify which
5 rules and sets of rules should be repealed or amend-
6 ed to lower the cost of regulation to the economy,
7 the Commission shall apply the following criteria:

8 (A) Whether the original purpose of the
9 rule or set of rules was achieved, and the rule
10 or set of rules could be repealed or amended
11 without significant recurrence of adverse effects
12 or conduct that the rule or set of rules was in-
13 tended to prevent or reduce.

14 (B) Whether the implementation, compli-
15 ance, administration, enforcement or other costs
16 of the rule or set of rules to the economy are
17 not justified by the benefits to society within
18 the United States produced by the expenditure
19 of those costs.

20 (C) Whether the rule or set of rules has
21 been rendered unnecessary or obsolete, taking
22 into consideration the length of time since the
23 rule was made and the degree to which tech-
24 nology, economic conditions, market practices,

1 or other relevant factors have changed in the
2 subject area affected by the rule or set of rules.

3 (D) Whether the rule or set of rules is in-
4 effective at achieving the rule or set's purpose.

5 (E) Whether the rule or set of rules over-
6 laps, duplicates, or conflicts with other federal
7 rules, and to the extent feasible, with state and
8 local governmental rules.

9 (F) Whether the rule or set of rules has
10 excessive compliance costs or is otherwise exces-
11 sively burdensome, as compared to alternatives
12 that—

13 (i) specify performance objectives
14 rather than conduct or manners of compli-
15 ance;

16 (ii) establish economic incentives to
17 encourage desired behavior;

18 (iii) provide information upon which
19 choices can be made by the public; or

20 (iv) incorporate other innovative alter-
21 natives rather than agency actions that
22 specify conduct or manners of compliance.

23 (G) Whether the rule or set of rules inhib-
24 its innovation in or growth of the United States
25 economy.

1 (H) Whether or not the rule or set of rules
2 harms competition within the United States
3 economy or the international economic competi-
4 tiveness of enterprises or entities based in the
5 United States.

6 (I) Such other criteria as the Commission
7 devises to identify rules and sets of rules that
8 can be repealed or amended to eliminate or re-
9 duce unnecessarily burdensome costs to the
10 United States economy.

11 (3) METHODOLOGY FOR REVIEW.—The Com-
12 mission shall establish a methodology for conducting
13 its review, identifying rules and sets of rules, and
14 classifying rules under this subsection and publish
15 the terms of its methodology in the Federal Register
16 and on an Internet Website of the Commission. The
17 Commission may propose and seek public comment
18 on the methodology before the methodology is estab-
19 lished.

20 (4) CLASSIFICATION OF RULES AND SETS OF
21 RULES.—

22 (A) IN GENERAL.—After completion of a
23 review under paragraph (2), the Commission
24 shall classify each rule or set of rules identified
25 in the review as either—

- 1 (i) a rule or set of rules—
2 (I) on which immediate action to
3 repeal or amend is recommended; or
4 (II) that should be eligible for
5 regulatory cut-go procedures under
6 title II; and
7 (ii) whether the rule or set of rules, in
8 either case, is recommended to be repealed
9 or, instead, amended.

10 If the rule is recommended to be amended, the
11 Commission shall specify the nature of the
12 amendments recommended and the amount of
13 regulatory cost reduction that the amendments
14 would achieve.

15 (B) DECISIONS BY MAJORITY.—Each deci-
16 sion by the Commission to identify a rule or set
17 of rules for classification under this paragraph,
18 and each decision whether to classify the rule or
19 set of rules under subparagraph (A)(i)(I) or, in-
20 stead, subparagraph (A)(i)(II), shall be made
21 by a simple majority vote of the Commission,
22 except that, in the case of a major rule or set
23 of major rules, the Chairman may determine to
24 identify and classify a rule or set of rules that

1 4 members of the Commission vote to identify
2 or classify.

3 (5) INITIATION OF REVIEW BY OTHER PER-
4 SONS.—

5 (A) IN GENERAL.—The Commission shall
6 also conduct a review under paragraph (2) of,
7 and, if appropriate, classify under paragraph
8 (4), any rule or set of rules that is submitted
9 for review to the Commission by—

10 (i) the President;

11 (ii) a Member of Congress;

12 (iii) any officer or employee of a Fed-
13 eral, State, local or tribal government, or
14 regional governmental body; or

15 (iv) any member of the public.

16 (B) FORM OF SUBMISSION.—A submission
17 to the Commission under this paragraph
18 shall—

19 (i) identify the specific rule or set of
20 rules submitted for review;

21 (ii) provide a statement of evidence to
22 demonstrate that the rule or set of rules
23 qualifies to be identified for repeal or
24 amendment under the criteria listed in
25 paragraph (2); and

1 (iii) such other information as the
2 submitter believes may be helpful to the
3 Commission's review, including a state-
4 ment of the submitter's interest in the
5 matter.

6 (i) NOTICES AND REPORTS OF THE COMMISSION.—

7 (1) NOTICES OF AND REPORTS ON ACTIVITIES.—The Commission shall publish, in the Federal
8 Register and on an Internet Website of the Commis-
9 sion—
10

11 (A) notices in advance of all public meet-
12 ings and hearings and classifications under sub-
13 section (h) informing the public of the basis,
14 purpose and procedures for the meeting, hear-
15 ing or classification; and

16 (B) reports after the conclusion of any
17 public meeting, hearing, or classification under
18 subsection (h) summarizing in detail the basis,
19 purpose and substance of the meeting, hearing,
20 or classification.

21 (2) ANNUAL REPORTS TO CONGRESS.—Each
22 year, beginning on the date that is one year after
23 the appointment of the ninth Member of the Com-
24 mission, the Commission shall submit a report to
25 Congress detailing the activities of the Commission

1 for the previous year, and listing all rules and sets
2 of rules classified under subsection (h) during that
3 year. For each rule or set of rules so listed, the
4 Commission shall—

5 (A) identify the agency that made the rule
6 or set of rules;

7 (B) identify the annual cost of the rule or
8 set of rules to the United States economy;

9 (C) identify whether or not the rule or set
10 of rules was classified under subsection
11 (h)(4)(A)(i)(I) or (h)(4)(A)(i)(II) and, in either
12 case, whether the rule is recommended to be re-
13 pealed or, instead, amended;

14 (D) if the rule or set of rules is rec-
15 ommended to be amended, summarize the na-
16 ture of the amendments recommended and the
17 amount of regulatory cost reductions that the
18 amendments would achieve; and

19 (E) identify the criteria under subsection
20 (h)(2) that caused the classification of the rule
21 or set of rules.

22 (3) FINAL REPORT.—Not later than the date
23 on which the Commission members' appointments
24 expire, the Commission shall submit a final report to
25 Congress summarizing all activities and rec-

1 ommendations of the Commission, including a list of
2 all rules or sets of rules the Commission classified
3 under subparagraph (h)(4)(A)(i)(I) for immediate
4 action to repeal or amend, a separate list of all rules
5 or sets of rules the Commission classified under sub-
6 paragraph (h)(4)(A)(i)(II) for repeal or amendment,
7 and with regard to each rule or set of rules listed
8 on either list, the information described in subpara-
9 graphs (A) through (E) of paragraph (2). This re-
10 port may be included in the final annual report of
11 the Commission under paragraph (2) and may in-
12 clude the Commission's recommendation whether the
13 Commission should be reauthorized by Congress.

14 (j) IMMEDIATE REPEAL OF REGULATIONS; CON-
15 GRESSIONAL CONSIDERATION OF FINAL COMMISSION RE-
16 PORT.—

17 (1) IN GENERAL.—Subject to paragraph (2),
18 the head of each agency with authority to repeal a
19 rule or set of rules classified by the Commission
20 under subparagraph (h)(4)(A)(i)(I) for immediate
21 action to repeal or amend and listed as such in the
22 Commission's final report under subsection (i)(3)
23 shall repeal or amend the rule or set of rules as rec-
24 ommended by the Commission within, in the case of
25 repeal, 60 days or, in the case of amendment, 120

1 days, after the expiration of the period specified in
2 paragraph (2) for disapproval of recommendations of
3 the Commission in the final report.

4 (2) CONGRESSIONAL DISAPPROVAL.—

5 (A) IN GENERAL.—Except as otherwise
6 provided under subsection (k), no head of an
7 agency described in paragraph (1) may carry
8 out any repeal or amendment classified for im-
9 mediate repeal by the Commission under sub-
10 paragraph (h)(4)(A)(i)(I) and listed as such by
11 the Commission in the final report transmitted
12 to Congress under subsection (i)(3) if a joint
13 resolution is enacted, in accordance with the
14 provisions of subparagraph (C), disapproving
15 such recommendations of the Commission for
16 immediate repeal or amendment before the ear-
17 lier of—

18 (i) the end of the 45-day period begin-
19 ning on the date on which the Commission
20 transmits such report; or

21 (ii) the adjournment of Congress sine
22 die for the session during which such re-
23 port is transmitted.

24 (B) COMPUTATION OF PERIOD.—For pur-
25 poses of subparagraphs (A) and (C), the days

1 on which either House of Congress is not in
2 session because of an adjournment of more
3 than three days to a day certain shall be ex-
4 cluded in the computation of a period.

5 (C) TERMS OF THE RESOLUTION.—For
6 purposes of paragraph (A), the term “joint res-
7 olution” means only a joint resolution which is
8 introduced within the 10-day period beginning
9 on the date on which the Commission transmits
10 the final report to the Congress under sub-
11 section (i)(3), and—

12 (i) which does not have a preamble;

13 (ii) the matter after the resolving
14 clause of which is as follows: “That Con-
15 gress disapproves the recommendations for
16 immediate repeal and amendment of the
17 Retrospective Regulatory Review Commis-
18 sion as submitted by the Commission on
19 _____”, the blank space being filled in
20 with the appropriate date; and

21 (iii) the title of which is as follows:
22 “Joint resolution disapproving the rec-
23 ommendations for immediate repeal and
24 amendment of the Retrospective Regu-
25 latory Review Commission.”

1 (D) REFERRAL.—A resolution described in
2 subparagraph (C) that is introduced in the
3 House of Representatives shall be referred to
4 the Committee on Oversight and Government
5 Reform of the House of Representatives. A res-
6 olution described in subparagraph (C) intro-
7 duced in the Senate shall be referred to the
8 Committee on Homeland Security and Govern-
9 mental Affairs.

10 (E) DISCHARGE.—If the committee to
11 which a resolution described in subparagraph
12 (C) is referred has not reported such resolution
13 (or an identical resolution) by the end of the
14 20-day period beginning on the date on which
15 the Commission transmits the final report to
16 the Congress under subsection (i)(3), such com-
17 mittee shall be, at the end of such period, dis-
18 charged from further consideration of such res-
19 olution, and such resolution shall be placed on
20 the appropriate calendar of the House involved.

21 (F) CONSIDERATION.—

22 (i) IN GENERAL.—On or after the
23 third day after the date on which the com-
24 mittee to which such a resolution is re-
25 ferred has reported, or has been discharged

1 (under subparagraph (E)) from further
2 consideration of, such a resolution, it is in
3 order (even though a previous motion to
4 the same effect has been disagreed to) for
5 any Member of the respective House to
6 move to proceed to the consideration of the
7 resolution. A Member may make the mo-
8 tion only on the day after the calendar day
9 on which the Member announces to the
10 House concerned the Member's intention
11 to make the motion, except that, in the
12 case of the House of Representatives, the
13 motion may be made without such prior
14 announcement if the motion is made by di-
15 rection of the committee to which the reso-
16 lution was referred. All points of order
17 against the resolution (and against consid-
18 eration of the resolution) are waived. The
19 motion is highly privileged in the House of
20 Representatives and is privileged in the
21 Senate and is not debatable. The motion is
22 not subject to amendment, or to a motion
23 to postpone, or to a motion to proceed to
24 the consideration of other business. A mo-
25 tion to reconsider the vote by which the

1 motion is agreed to or disagreed to shall
2 not be in order. If a motion to proceed to
3 the consideration of the resolution is
4 agreed to, the respective House shall im-
5 mediately proceed to consideration of the
6 joint resolution without intervening motion,
7 order, or other business, and the resolution
8 shall remain the unfinished business of the
9 respective House until disposed of.

10 (ii) DEBATE.—Debate on the resolu-
11 tion, and on all debatable motions and ap-
12 peals in connection therewith, shall be lim-
13 ited to not more than 2 hours, which shall
14 be divided equally between those favoring
15 and those opposing the resolution. An
16 amendment to the resolution is not in
17 order. A motion further to limit debate is
18 in order and not debatable. A motion to
19 postpone, or a motion to proceed to the
20 consideration of other business, or a mo-
21 tion to recommit the resolution is not in
22 order. A motion to reconsider the vote by
23 which the resolution is agreed to or dis-
24 agreed to is not in order

1 (iii) VOTE ON FINAL PASSAGE.—Im-
2 mediately following the conclusion of the
3 debate on a resolution described in sub-
4 paragraph (C) and a single quorum call at
5 the conclusion of the debate if requested in
6 accordance with the rules of the appro-
7 priate House, the vote on final passage of
8 the resolution shall occur.

9 (iv) APPEALS FROM DECISIONS OF
10 THE CHAIR.—Appeals from the decisions
11 of the Chair relating to the application of
12 the rules of the Senate or the House of
13 Representatives, as the case may be, to the
14 procedure relating to a resolution described
15 in subparagraph (C) shall be decided with-
16 out debate.

17 (G) CONSIDERATION BY OTHER HOUSE.—

18 (i) IN GENERAL.—If, before the pas-
19 sage by one House of a resolution of that
20 House described in subparagraph (C), that
21 House receives from the other House a
22 resolution described in subparagraph (C),
23 then the following procedures shall apply:

24 (I) REFERRAL.—The resolution
25 of the other House shall not be re-

1 ferred to a committee and may not be
2 considered in the House receiving it
3 except in the case of final passage as
4 provided in subparagraph (G)(II).

5 (II) PROCEDURE THERE-
6 AFTER.—With respect to a resolution
7 described in subparagraph (C) of the
8 House receiving the resolution—

9 (aa) the procedure in that
10 House shall be the same as if no
11 resolution had been received from
12 the other House; and

13 (bb) the vote on final pas-
14 sage shall be on the resolution of
15 the other House

16 (ii) NO LONGER IN ORDER.—Upon
17 disposition of the resolution received from
18 the other House, it shall no longer be in
19 order to consider the resolution that origi-
20 nated in the receiving House.

21 (II) RULES OF THE SENATE AND
22 HOUSE.—This section is enacted by Congress—

23 (i) as an exercise of the rulemaking
24 power of the Senate and House of Rep-
25 resentatives, respectively, and as such it is

1 deemed a part of the rules of each House,
 2 respectively, but applicable only with re-
 3 spect to the procedure to be followed in
 4 that House in the case of a resolution de-
 5 scribed in subparagraph (C), and it super-
 6 sedes other rules only to the extent that it
 7 is inconsistent with such rules; and

8 (ii) with full recognition of the con-
 9 stitutional right of either House to change
 10 the rules (so far as relating to the proce-
 11 dure of that House) at any time, in the
 12 same manner, and to the same extent as in
 13 the case of any other rule of that House.

14 (k) APPLICATION OF CUT-GO PROCEDURES TO
 15 RULES OR SETS OF RULES AFFECTED BY A JOINT RESO-
 16 LUTION.—All rules and sets of rules for which a resolution
 17 of disapproval under subsection (j) has been enacted shall
 18 thereafter be repealed or amended under title II of this
 19 Act.

20 (l) TRANSFER OF FUNDS FROM REGULATORY AGEN-
 21 CIES.—Of the unobligated amounts made available in fu-
 22 ture fiscal years for each agency that makes rules subject
 23 to review by the Commission, up to 1 percent or
 24 \$25,000,000, whichever is greater, shall be available for
 25 the Commission.

1 (m) CONSULTATION BETWEEN THE CHAIRMAN AND
 2 THE DIRECTOR.—The Chairman of the Commission shall
 3 consult with the Director of the Office of Management and
 4 Budget before making requests for agency funds under
 5 paragraph (j).

6 **TITLE II—REGULATORY CUT-GO**

7 **SEC. 201. CUT-GO PROCEDURES.**

8 (a) IN GENERAL.—Except as provided in section 202,
 9 an agency, when the agency makes a new rule, shall repeal
 10 or amend rules or sets of rules of that agency classified
 11 by the Commission under section 101(h)(4)(A)(i)(II) or
 12 required to be repealed or amended by the agency under
 13 section 101(k), such that the annual costs of the new rule
 14 to the United States economy is offset by such repeals or
 15 amendments, in an amount equal to or greater than the
 16 cost of the new rule, based on the regulatory cost reduc-
 17 tions of repeal or amendment identified by the Commis-
 18 sion.

19 (b) ALTERNATIVE PROCEDURE.—An agency may, al-
 20 ternatively, repeal or amend a rule or set of rules of that
 21 agency classified by the Commission under section
 22 101(h)(4)(A)(i)(II) or required to be repealed or amended
 23 by the agency under section 101(k) prior to the time speci-
 24 fied in subsection (a). If the agency so repeals or amends
 25 such a rule or set of rules and thereby reduces the annual,

1 inflation-adjusted cost of the rule or set of rules to the
 2 United States economy, the agency may thereafter apply
 3 the reduction in regulatory costs, based on the regulatory
 4 cost reductions of repeal or amendment identified by the
 5 Commission, to meet, in whole or in part, the regulatory
 6 cost reduction required under subsection (a) of this section
 7 to be made at the time the agency promulgates a new rule.

8 **SEC. 202. APPLICABILITY.**

9 An agency shall no longer be subject to the require-
 10 ments of section 201 and 203 beginning on the date that
 11 there is no rule or set of rules of the agency classified
 12 by the Commission under section 101(d)(4)(A)(i)(II) or
 13 required to be repealed or amended by the agency under
 14 section 101(k) that has not been repealed or amended
 15 such that all regulatory cost reductions identified by the
 16 Commission to be achievable through repeal or amend-
 17 ment have been achieved.

18 **SEC. 203. CONGRESSIONAL APPROVAL OF RULES LACKING**
 19 **REQUIRED AGENCY OFFSETS.**

20 (a) LIMITATION ON CUT-GO RULE TAKING EF-
 21 FECT.—Section 801(a) of title 5, United States Code, is
 22 amended—

23 (1) in paragraph (1)(B)—

24 (A) in clause (iii), by striking “and” at the
 25 end;

1 (B) by inserting after clause (iii) the fol-
2 lowing:

3 “(iv) a certification that the agency
4 has complied with section 201 of the
5 Searching for and Cutting Regulations
6 that are Unnecessarily Burdensome Act of
7 2014 and a brief summary of the repeals
8 and amendments made by the agency to so
9 comply; and”.

10 (C) by redesignating clause (iv) as clause
11 (v).

12 (2) in paragraph (2), by adding at the end the
13 following:

14 “(C) The Comptroller General shall pro-
15 vide a report on each rule to the committees of
16 jurisdiction in each House of the Congress by
17 the end of 15 calendar days after the submis-
18 sion or publication date as provided in section
19 802(b)(2). The report of the Comptroller Gen-
20 eral shall include an assessment of the agency’s
21 compliance with section 201 of the Searching
22 for and Cutting Regulations that are Unneces-
23 sarily Burdensome Act of 2014, including a cer-
24 tification of whether the agency has or has not
25 complied.”.

1 (3) in paragraph (4), by inserting after “major
2 rule” the following: “or a cut-go rule”; and

3 (4) by adding at the end the following:

4 “(6) A cut-go rule relating to a report sub-
5 mitted under paragraph (1) shall take effect only on
6 the date that a joint resolution authorizing such rule
7 is enacted. A cut-go rule that does not take effect
8 under this paragraph may not be reissued in sub-
9 stantially the same form, and a new rule that is sub-
10 stantially the same as such a rule may not be issued,
11 unless the reissued or new rule complies with section
12 201 of the Searching for and Cutting Regulations
13 that are Unnecessarily Burdensome Act of 2014 or
14 is specifically authorized by a law enacted after the
15 date of the submission of a report relating to the
16 cut-go rule.”.

17 (b) CUT-GO RULE DEFINED.—Section 804 of title 5,
18 United States Code, is amended by adding at the end the
19 following:

20 “(4) The term ‘cut-go rule’ means any rule
21 made by an agency that is subject to section 201 of
22 the Searching for and Cutting Regulations that are
23 Unnecessarily Burdensome Act of 2014, and with
24 regard to which the Comptroller General of the
25 United States certifies under section 801(a)(2)(C)

1 that the agency has not complied with such section
 2 201 by repealing or amending rules and sets of rules
 3 classified by the Retrospective Regulatory Review
 4 Commission under section 101(d)(4)(A)(i)(II) or re-
 5 quired to be repealed or amended by the agency
 6 under section 101(k) of such Act.”.

7 (c) CONGRESSIONAL APPROVAL OF NEW RULES.—

8 (1) IN GENERAL.—Chapter 8 of title 5 is
 9 amended by adding at the end the following:

10 **“§ 809. Cut-go rules**

11 “(a)(1) For purposes of this section, the term ‘joint
 12 resolution’ means only a joint resolution addressing a re-
 13 port classifying a rule as a cut-go rule pursuant to section
 14 801(a)(1)(A)(iii) that

15 “(A) bears no preamble;

16 “(B) bears the following title: ‘Approving
 17 the rule submitted by _____ relating to
 18 _____.’ (The blank spaces being appropriately
 19 filled in);

20 “(C) includes after its resolving clause only
 21 the following: ‘That Congress approves the rule
 22 submitted by _____ relating to _____.’ (The
 23 blank spaces being appropriately filled in); and

24 “(D) is introduced pursuant to paragraph
 25 (2).

1 “(2) After a House of Congress receives a re-
2 port pursuant to section 801(a)(2)(C) that the agen-
3 cy has not complied with section 201 of the Search-
4 ing for and Cutting Regulations that are Unneces-
5 sarily Burdensome Act of 2014, the majority leader
6 of that House (or the designee of the majority lead-
7 er) shall introduce (by request, if appropriate) a
8 joint resolution described in paragraph (1)—

9 “(A) in the case of the House of Rep-
10 resentatives, within 3 legislative days; and

11 “(B) in the case of the Senate, within 3
12 session days.

13 “(3) A joint resolution described in paragraph
14 (1) shall not be subject to amendment at any stage
15 of proceeding.

16 “(b) A joint resolution described in subsection (a)
17 shall be referred in each House of Congress to the commit-
18 tees having jurisdiction over the provision of law under
19 which the rule is issued.

20 “(c) In the Senate, if the committee or committees
21 to which a joint resolution described in subsection (a) has
22 been referred have not reported it at the end of 15 session
23 days after its introduction, such committee or committees
24 shall be automatically discharged from further consider-
25 ation of the resolution and it shall be placed on the cal-

1 endar. A vote on final passage of the resolution shall be
2 taken on or before the close of the 15th session day after
3 the resolution is reported by the committee or committees
4 to which it was referred, or after such committee or com-
5 mittees have been discharged from further consideration
6 of the resolution.

7 “(d)(1) In the Senate, when the committee or com-
8 mittees to which a joint resolution is referred have re-
9 ported, or when a committee or committees are discharged
10 (under subsection (c)) from further consideration of a
11 joint resolution described in subsection (a), it is at any
12 time thereafter in order (even though a previous motion
13 to the same effect has been disagreed to) for a motion
14 to proceed to the consideration of the joint resolution, and
15 all points of order against the joint resolution (and against
16 consideration of the joint resolution) are waived. The mo-
17 tion is not subject to amendment, or to a motion to post-
18 pone, or to a motion to proceed to the consideration of
19 other business. A motion to reconsider the vote by which
20 the motion is agreed to or disagreed to shall not be in
21 order. If a motion to proceed to the consideration of the
22 joint resolution is agreed to, the joint resolution shall re-
23 main the unfinished business of the Senate until disposed
24 of.

1 “(2) In the Senate, debate on the joint resolu-
2 tion, and on all debatable motions and appeals in
3 connection therewith, shall be limited to not more
4 than 2 hours, which shall be divided equally between
5 those favoring and those opposing the joint resolu-
6 tion. A motion to further limit debate is in order and
7 not debatable. An amendment to, or a motion to
8 postpone, or a motion to proceed to the consider-
9 ation of other business, or a motion to recommit the
10 joint resolution is not in order.

11 “(3) In the Senate, immediately following the
12 conclusion of the debate on a joint resolution de-
13 scribed in subsection (a), and a single quorum call
14 at the conclusion of the debate if requested in ac-
15 cordance with the rules of the Senate, the vote on
16 final passage of the joint resolution shall occur.

17 “(4) Appeals from the decisions of the Chair re-
18 lating to the application of the rules of the Senate
19 to the procedure relating to a joint resolution de-
20 scribed in subsection (a) shall be decided without de-
21 bate.

22 “(c) In the House of Representatives, if the com-
23 mittee or committees to which a joint resolution described
24 in subsection (a) has been referred has not reported it to
25 the House at the end of 15 legislative days after its intro-

1 duction, such committee or committees shall be discharged
2 from further consideration of the joint resolution, and it
3 shall be placed on the appropriate calendar. On the second
4 and fourth Thursdays of each month it shall be in order
5 at any time for the Speaker to recognize a Member who
6 favors passage of a joint resolution that has appeared on
7 the calendar for not fewer than 5 legislative days to call
8 up the joint resolution for immediate consideration in the
9 House without intervention of any point of order. When
10 so called up, a joint resolution shall be considered as read
11 and shall be debatable for 1 hour equally divided and con-
12 trolled by the proponent and an opponent, and the pre-
13 vious question shall be considered as ordered to its pas-
14 sage without intervening motion. It shall not be in order
15 to reconsider the vote on passage. If a vote on final pas-
16 sage of the joint resolution has not been taken by the third
17 Thursday on which the Speaker may recognize a Member
18 under this subsection, such vote shall be taken on that
19 day.

20 “(f)(1) For purposes of this subsection, the term
21 ‘identical joint resolution’ means a joint resolution of the
22 first House that proposes to approve the same cut-go rule
23 as a joint resolution of the second House.

24 “(2) If the second House receives from the first
25 House a joint resolution, the Chair shall determine

1 whether the joint resolution is an identical joint res-
 2 olution.

3 “(3) If the second House receives an identical
 4 joint resolution—

5 “(A) the identical joint resolution shall not
 6 be referred to a committee; and

7 “(B) the procedure in the second House
 8 shall be the same as if no joint resolution had
 9 been received from the first house, except that
 10 the vote on final passage shall be on the iden-
 11 tical joint resolution.

12 “(4) This subsection shall not apply to the
 13 House of Representatives if the joint resolution re-
 14 ceived from the Senate is a revenue measure.

15 “(g) If either House has not taken a vote on final
 16 passage of the joint resolution by the last day of the period
 17 described in section 801(b)(2), then such vote shall be
 18 taken on that day.”.

19 (2) TABLE OF SECTIONS.—The table of sections
 20 for such chapter 8 is amended by adding at the end
 21 the following:

“§ 809. Cut-go rules.”.

22 **SEC. 204. OIRA CERTIFICATION OF COST-BENEFIT CAL-**
 23 **CULATIONS.**

24 The Administrator of the Office of Information and
 25 Regulatory Affairs of the Office of Management and Budg-

1 et shall review and certify the accuracy of agency deter-
2 minations of the costs of new rules under section 201. The
3 certification shall be included in the administrative record
4 of the relevant rule making by the agency promulgating
5 the rule, and the Administrator shall transmit a copy of
6 the certification to Congress when it transmits the certifi-
7 cation to the agency.

8 **TITLE III—RETROSPECTIVE** 9 **REVIEW OF NEW RULES**

10 **SEC. 301. PLAN FOR FUTURE REVIEW.**

11 When an agency makes a rule, the agency shall in-
12 clude in the final issuance of such rule a plan for the re-
13 view of such rule by not later than 10 years after the date
14 such rule is made. Such a review, in the case of a major
15 rule, shall be substantially similar to the review by the
16 Commission under section 101(h). Whenever feasible, the
17 agency shall include a proposed plan for review of a pro-
18 posed rule in its notice of proposed rulemaking and shall
19 receive public comment on the plan.

20 **TITLE IV—JUDICIAL REVIEW**

21 **SEC. 401. JUDICIAL REVIEW.**

22 Agency compliance with section 301 shall be subject
23 to judicial review under chapter 7 of title 5.

1 **TITLE V—MISCELLANEOUS**
2 **PROVISIONS**

3 **SEC. 501. DEFINITIONS.**

4 In this Act:

5 (1) The term “agency” has the meaning given
6 such term in section 551 of title 5, United States
7 Code.

8 (2) The term “Commission” means the Retro-
9 spective Regulatory Review Commission established
10 under section 101.

11 (3) The term “major rule” means any rule that
12 the Administrator of the Office of Information and
13 Regulatory Affairs determines is likely to impose—

14 (A) an annual cost on the economy of
15 \$100,000,000 or more, adjusted annually for
16 inflation;

17 (B) a major increase in costs or prices for
18 consumers, individual industries, Federal,
19 State, local, or tribal government agencies, or
20 geographic regions;

21 (C) significant adverse effects on competi-
22 tion, employment, investment, productivity, in-
23 novation, or on the ability of United States-
24 based enterprises to compete with foreign-based
25 enterprises in domestic and export markets; or

Mr. JOHNSON. Thank you, Mr. Chairman.

I am a little hesitant today because I have been informed that earlier this morning a gentleman was sitting in this chair, and the gentleman was operating this microphone and in doing so, he sustained a shock. And so I am deeply concerned that I may not survive this hearing.

Mr. BACHUS. We have learned since then that he rests in peace. [Laughter.]

Mr. JOHNSON. Well, I am hopeful that you all are praying for my salvation.

But I am pleased to now serve as the Ranking Member on the Subcommittee on Regulatory Reform, Commercial and Antitrust Law. As the former Chairman of the Antitrust Subcommittee, I know that it has a particularly exciting range of issues, many of which should provide a pathway to work cooperatively across the aisle. That is why I am particularly disappointed with the process and substance of today's hearing, which is my first as Ranking Member.

Regarding process, although today's hearing is intended to be a legislative hearing, we did not receive a copy of the draft legislation until Friday afternoon and did not receive a final version of the bill until yesterday evening. This is obviously problematic. It not only affects our ability to adequately prepare for the hearing, but also the ability of our witnesses to carefully analyze the legislation and draft their testimony under severe time constraints.

As to substance, it had been my hope that the subject matter of this hearing would have better linked itself to a more collaborative effort. I think all would agree that retrospective review is a good idea. There is no doubt that out-of-date, redundant, and conflicting rules should be eliminated. In fact, President Obama, in recognition of the value of retrospective review, issued a series of executive orders requiring agencies to effectuate review plans, a process that is now in effect. This process is in addition to the self-initiated reviews that many agencies conduct, as well as the reviews conducted pursuant to the Regulatory Flexibility Act.

Unfortunately, the so-called SCRUB Act, which is the subject of today's hearing, appears to be a one-way ratchet with the sole aim of prioritizing costs over benefits. The measure fails to give agencies the necessary resources and guidance so that they will do an even better job of conducting retrospective review.

Even more problematic is the fact that the SCRUB Act may very well be plainly unconstitutional. As Professor Levin explains in his prepared testimony, the commission, as established by this legislation, is given comprehensive authority to take actions that would have the force of law even though its members are not presidential appointees subject to Senate confirmation. I do not believe Professor Levin has reached this conclusion without careful reflection, and I encourage him to focus upon that issue in his oral testimony.

Compounding the problem is the fact that the bill uses undefined terms that are inherently subjective in nature, such as, "excessive compliance cost," and "excessively burdensome." Clearly "excessive" can be a matter of opinion depending on which perspective one views the issue, such as regulations that save lives but impose certain compliance costs. As a result of these and other serious flaws

with this legislation, it is clear that the SCRUB Act is yet another shortsighted anti-regulatory measure that has no hope of becoming law.

But I do have hope that I will survive this hearing, and I hope that during this time that Chairman Bachus and I are working together on this Subcommittee, that we will be able to find common ground on process and substance. As we begin this new session of Congress, I very much look forward to working with you, Mr. Chairman.

And I yield back.

Mr. BACHUS. Thank you.

Mr. Johnson, we did have a very good meeting earlier today, and I think we mutually pledged to try to work cooperatively together and try to find consensus on the issues. And I appreciate your spirit of cooperation that you have shown in the past.

And I will say to you that this bill, in its preparation, did come late, and I think there was some, obviously, limited time that you had to review it, and I concede that to you. In the future, we will work together to see that that is not the norm but that is the exception.

Mr. JOHNSON. Would the gentleman yield?

Mr. BACHUS. Yes.

Mr. JOHNSON. I might add, Mr. Chairman, that I have such great respect and admiration for you. You have been a vocal supporter of civil rights, being an initial cosponsor of the Voting Rights Amendments Act. This kind of conduct that you have exemplified throughout your years in Congress is a hallmark of civility. And so I have no doubt that whatever happened this past week is something that happened, but we are going to proceed on from here. And so I look forward to serving with you, and I think everything is going to be okay if I survive this hearing.

Mr. BACHUS. Thank you. We will try, make every effort to get you through this hearing. And I appreciate your words.

With that, I would like to recognize the sponsor of this legislation, Mr. Jason Smith of Missouri, for an opening statement.

Mr. SMITH OF MISSOURI. Mr. Chairman, thank you for holding this hearing. Much appreciated.

As the former Chairman of the Joint Committee on Administrative Rules back in the Missouri House, which I served just over 8 months ago, I have some experience working to reduce the regulatory burden facing families, small business owners, and farmers.

In 2012, while serving in the Missouri House of Representatives, I worked to pass House bill 1135, which requires that all State rules and regulations be reviewed every 5 years. Like the bill we are discussing today, House bill 1135 required that rules be examined under various criteria to determine if, among other things, they were effective, obsolete, or duplicated.

The Federal Government could learn a thing or two from what we have accomplished in the State of Missouri. It was Missouri's over 6,000 State regulations that led me to believe that reform was necessary. In the Code of Federal Regulations, there are over 174,000 pages of rules and regulations. During my short time in Congress, I have been amazed by the broad Federal authority agencies have to write numerous new regulations. Worse yet, Con-

gress and the American public have very little oversight and authority over agencies' rulemaking process.

The Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014, or SCRUB Act, creates a bipartisan commission to examine Federal rules and regulations that merit repeal and amendment to reduce unnecessary cost burdens for American citizens. In addition, it requires an automatic review on all new rules after 10 years and creates a cut-go procedure whereby agencies need to repeal old regulations before they can issue new ones absent congressional consent.

I look forward to hearing from the witnesses and other Members about ways to really tackle regulation reform and invite input on a way to move forward.

Thank you, Mr. Chairman, for this opportunity today to discuss this legislation.

Mr. BACHUS. Thank you, Mr. Smith.

I would now like to recognize the full Committee Ranking Member, Mr. John Conyers of Michigan, for his opening statement and also warn you that we are getting shocks from some of these mics. [Laughter.]

Mr. CONYERS. Well, thank you very much, Chairman Bachus.

I am here to participate with a question. Why do we not have a bill instead of a discussion draft with these distinguished witnesses who are here?

Mr. BACHUS. That is a good question, a valid question. It is my understanding that in introducing the bill, there were some—as my able counsel advised me, we had already sent the witnesses notice when we realized that we were not going to be assigned a bill number, but actually the draft before you is the bill in its final form. It does not have a number. And I am not sure that I can give you an explanation of that, John. I am not going to give you an incorrect.

As I told Mr. Johnson in response to his statement, that is an anomaly and we will try not to repeat that in the future.

Mr. CONYERS. Thank you, Mr. Chairman.

Can you, Mr. Bachus, indicate to me when the bill will be dropped and we will be able to compare the discussion draft with the actual legislation?

Mr. BACHUS. Yes. My understanding is this is the bill in the final form. But, Mr. Smith, could—

Mr. CONYERS. I will yield to Mr. Smith.

Mr. SMITH OF MISSOURI. You know, this appears to be the bill in the final form. One of the purposes of a draft legislation is I want some true bipartisan regulation reform, and this is a way to start. If you all have suggestions on how to move this forward to actually do some substantial reform, this is the way that we can make the changes.

Mr. CONYERS. Well, when will the bill be introduced?

Mr. SMITH OF MISSOURI. Well, right now, I would say as soon as possible, but we have been working on this for some time.

Mr. BACHUS. I would say this. By the time we reconvene, after today, our next legislative session, which is about 10 or 12 days away, assuming that we address our debt ceiling today, which I am

assuming we will, when we return, we should have the bill in final form.

Mr. CONYERS. Thank you very much.

I would like to ask unanimous consent to introduce two of President Obama's—well, actually three executive orders. Yes, I have three executive orders outlining steps that Federal agencies must take to formulate plans for retrospective review of their regulations on an ongoing basis.

Mr. BACHUS. Without objection.

[The information referred to follows:]

Federal Register
Vol. 58, No. 190
Monday, October 4, 1993

Presidential Documents

Title 3—

Executive Order 12866 of September 30, 1993

The President

Regulatory Planning and Review

The American people deserve a regulatory system that works for them, not against them; a regulatory system that protects and improves their health, safety, environment, and well-being and improves the performance of the economy without imposing unacceptable or unreasonable costs on society; regulatory policies that recognize that the private sector and private markets are the best engine for economic growth; regulatory approaches that respect the role of State, local, and tribal governments; and regulations that are effective, consistent, sensible, and understandable. We do not have such a regulatory system today.

With this Executive order, the Federal Government begins a program to reform and make more efficient the regulatory process. The objectives of this Executive order are to enhance planning and coordination with respect to both new and existing regulations; to reaffirm the primacy of Federal agencies in the regulatory decision-making process; to restore the integrity and legitimacy of regulatory review and oversight; and to make the process more accessible and open to the public. In pursuing these objectives, the regulatory process shall be conducted so as to meet applicable statutory requirements and with due regard to the discretion that has been entrusted to the Federal agencies.

Accordingly, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Statement of Regulatory Philosophy and Principles.*

(a) *The Regulatory Philosophy.* Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.

(b) *The Principles of Regulation.* To ensure that the agencies' regulatory programs are consistent with the philosophy set forth above, agencies should adhere to the following principles, to the extent permitted by law and where applicable:

- (1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.
- (2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is

intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(4) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the degree and nature of the risks posed by various substances or activities within its jurisdiction.

(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.

(6) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

(7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

(8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(9) Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.

(10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.

(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

(12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

Sec. 2. Organization. An efficient regulatory planning and review process is vital to ensure that the Federal Government's regulatory system best serves the American people.

(a) *The Agencies.* Because Federal agencies are the repositories of significant substantive expertise and experience, they are responsible for developing regulations and assuring that the regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order.

(b) *The Office of Management and Budget.* Coordinated review of agency rulemaking is necessary to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order, and that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. The Office of Management and Budget (OMB) shall carry out that review function. Within OMB, the Office of Information and Regulatory Affairs (OIRA) is the repository of expertise concerning regulatory issues, including methodologies and procedures that affect more than one agency, this Executive order, and the President's regulatory policies. To the extent permitted by law, OMB shall provide guidance to agencies and assist the President, the Vice President, and other regulatory policy advisors to the President in regulatory planning and shall be the entity that reviews individual regulations, as provided by this Executive order.

(c) *The Vice President.* The Vice President is the principal advisor to the President on, and shall coordinate the development and presentation of recommendations concerning, regulatory policy, planning, and review, as set forth in this Executive order. In fulfilling their responsibilities under this Executive order, the President and the Vice President shall be assisted by the regulatory policy advisors within the Executive Office of the President and by such agency officials and personnel as the President and the Vice President may, from time to time, consult.

Sec. 3. Definitions. For purposes of this Executive order: (a) "Advisors" refers to such regulatory policy advisors to the President as the President and Vice President may from time to time consult, including, among others: (1) the Director of OMB; (2) the Chair (or another member) of the Council of Economic Advisers; (3) the Assistant to the President for Economic Policy; (4) the Assistant to the President for Domestic Policy; (5) the Assistant to the President for National Security Affairs; (6) the Assistant to the President for Science and Technology; (7) the Assistant to the President for Intergovernmental Affairs; (8) the Assistant to the President and Staff Secretary; (9) the Assistant to the President and Chief of Staff to the Vice President; (10) the Assistant to the President and Counsel to the President; (11) the Deputy Assistant to the President and Director of the White House Office on Environmental Policy; and (12) the Administrator of OIRA, who also shall coordinate communications relating to this Executive order among the agencies, OMB, the other Advisors, and the Office of the Vice President.

(b) "Agency," unless otherwise indicated, means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10).

(c) "Director" means the Director of OMB.

(d) "Regulation" or "rule" means an agency statement of general applicability and future effect, which the agency intends to have the force and effect of law, that is designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency. It does not, however, include:

(1) Regulations or rules issued in accordance with the formal rulemaking provisions of 5 U.S.C. 556, 557;

(2) Regulations or rules that pertain to a military or foreign affairs function of the United States, other than procurement regulations and regulations involving the import or export of non-defense articles and services;

(3) Regulations or rules that are limited to agency organization, management, or personnel matters; or

(4) Any other category of regulations exempted by the Administrator of OIRA.

(e) "Regulatory action" means any substantive action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices

of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.

(f) "Significant regulatory action" means any regulatory action that is likely to result in a rule that may:

- (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Sec. 4. Planning Mechanism. In order to have an effective regulatory program, to provide for coordination of regulations, to maximize consultation and the resolution of potential conflicts at an early stage, to involve the public and its State, local, and tribal officials in regulatory planning, and to ensure that new or revised regulations promote the President's priorities and the principles set forth in this Executive order, these procedures shall be followed, to the extent permitted by law:

(a) *Agencies' Policy Meeting.* Early in each year's planning cycle, the Vice President shall convene a meeting of the Advisors and the heads of agencies to seek a common understanding of priorities and to coordinate regulatory efforts to be accomplished in the upcoming year.

(b) *Unified Regulatory Agenda.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). Each agency shall prepare an agenda of all regulations under development or review, at a time and in a manner specified by the Administrator of OIRA. The description of each regulatory action shall contain, at a minimum, a regulation identifier number, a brief summary of the action, the legal authority for the action, any legal deadline for the action, and the name and telephone number of a knowledgeable agency official. Agencies may incorporate the information required under 5 U.S.C. 602 and 41 U.S.C. 402 into these agendas.

(c) *The Regulatory Plan.* For purposes of this subsection, the term "agency" or "agencies" shall also include those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(10). (1) As part of the Unified Regulatory Agenda, beginning in 1994, each agency shall prepare a Regulatory Plan (Plan) of the most important significant regulatory actions that the agency reasonably expects to issue in proposed or final form in that fiscal year or thereafter. The Plan shall be approved personally by the agency head and shall contain at a minimum:

- (A) A statement of the agency's regulatory objectives and priorities and how they relate to the President's priorities;
- (B) A summary of each planned significant regulatory action including, to the extent possible, alternatives to be considered and preliminary estimates of the anticipated costs and benefits;
- (C) A summary of the legal basis for each such action, including whether any aspect of the action is required by statute or court order;
- (D) A statement of the need for each such action and, if applicable, how the action will reduce risks to public health, safety, or the environment, as well as how the magnitude of the risk addressed by the action relates to other risks within the jurisdiction of the agency;
- (E) The agency's schedule for action, including a statement of any applicable statutory or judicial deadlines; and

(F) The name, address, and telephone number of a person the public may contact for additional information about the planned regulatory action.

(2) Each agency shall forward its Plan to OIRA by June 1st of each year.

(3) Within 10 calendar days after OIRA has received an agency's Plan, OIRA shall circulate it to other affected agencies, the Advisors, and the Vice President.

(4) An agency head who believes that a planned regulatory action of another agency may conflict with its own policy or action taken or planned shall promptly notify, in writing, the Administrator of OIRA, who shall forward that communication to the issuing agency, the Advisors, and the Vice President.

(5) If the Administrator of OIRA believes that a planned regulatory action of an agency may be inconsistent with the President's priorities or the principles set forth in this Executive order or may be in conflict with any policy or action taken or planned by another agency, the Administrator of OIRA shall promptly notify, in writing, the affected agencies, the Advisors, and the Vice President.

(6) The Vice President, with the Advisors' assistance, may consult with the heads of agencies with respect to their Plans and, in appropriate instances, request further consideration or inter agency coordination.

(7) The Plans developed by the issuing agency shall be published annually in the October publication of the Unified Regulatory Agenda. This publication shall be made available to the Congress; State, local, and tribal governments; and the public. Any views on any aspect of any agency Plan, including whether any planned regulatory action might conflict with any other planned or existing regulation, impose any unintended consequences on the public, or confer any unclaimed benefits on the public, should be directed to the issuing agency, with a copy to OIRA.

(d) *Regulatory Working Group.* Within 30 days of the date of this Executive order, the Administrator of OIRA shall convene a Regulatory Working Group ("Working Group"), which shall consist of representatives of the heads of each agency that the Administrator determines to have significant domestic regulatory responsibility, the Advisors, and the Vice President. The Administrator of OIRA shall chair the Working Group and shall periodically advise the Vice President on the activities of the Working Group. The Working Group shall serve as a forum to assist agencies in identifying and analyzing important regulatory issues (including, among others (1) the development of innovative regulatory techniques, (2) the methods, efficacy, and utility of comparative risk assessment in regulatory decision-making, and (3) the development of short forms and other streamlined regulatory approaches for small businesses and other entities). The Working Group shall meet at least quarterly and may meet as a whole or in subgroups of agencies with an interest in particular issues or subject areas. To inform its discussions, the Working Group may commission analytical studies and reports by OIRA, the Administrative Conference of the United States, or any other agency.

(e) *Conferences.* The Administrator of OIRA shall meet quarterly with representatives of State, local, and tribal governments to identify both existing and proposed regulations that may uniquely or significantly affect those governmental entities. The Administrator of OIRA shall also convene, from time to time, conferences with representatives of businesses, nongovernmental organizations, and the public to discuss regulatory issues of common concern.

Sec. 5. Existing Regulations. In order to reduce the regulatory burden on the American people, their families, their communities, their State, local, and tribal governments, and their industries; to determine whether regulations promulgated by the executive branch of the Federal Government have become unjustified or unnecessary as a result of changed circumstances; to confirm that regulations are both compatible with each other and not

duplicate or inappropriately burdensome in the aggregate; to ensure that all regulations are consistent with the President's priorities and the principles set forth in this Executive order, within applicable law; and to otherwise improve the effectiveness of existing regulations: (a) Within 90 days of the date of this Executive order, each agency shall submit to OIRA a program, consistent with its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified or eliminated so as to make the agency's regulatory program more effective in achieving the regulatory objectives, less burdensome, or in greater alignment with the President's priorities and the principles set forth in this Executive order. Any significant regulations selected for review shall be included in the agency's annual Plan. The agency shall also identify any legislative mandates that require the agency to promulgate or continue to impose regulations that the agency believes are unnecessary or outdated by reason of changed circumstances.

(b) The Administrator of OIRA shall work with the Regulatory Working Group and other interested entities to pursue the objectives of this section. State, local, and tribal governments are specifically encouraged to assist in the identification of regulations that impose significant or unique burdens on those governmental entities and that appear to have outlived their justification or be otherwise inconsistent with the public interest.

(c) The Vice President, in consultation with the Advisors, may identify for review by the appropriate agency or agencies other existing regulations of an agency or groups of regulations of more than one agency that affect a particular group, industry, or sector of the economy, or may identify legislative mandates that may be appropriate for reconsideration by the Congress.

Sec. 6. Centralized Review of Regulations. The guidelines set forth below shall apply to all regulatory actions, for both new and existing regulations, by agencies other than those agencies specifically exempted by the Administrator of OIRA:

(a) *Agency Responsibilities.* (1) Each agency shall (consistent with its own rules, regulations, or procedures) provide the public with meaningful participation in the regulatory process. In particular, before issuing a notice of proposed rulemaking, each agency should, where appropriate, seek the involvement of those who are intended to benefit from and those expected to be burdened by any regulation (including, specifically, State, local, and tribal officials). In addition, each agency should afford the public a meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days. Each agency also is directed to explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

(2) Within 60 days of the date of this Executive order, each agency head shall designate a Regulatory Policy Officer who shall report to the agency head. The Regulatory Policy Officer shall be involved at each stage of the regulatory process to foster the development of effective, innovative, and least burdensome regulations and to further the principles set forth in this Executive order.

(3) In addition to adhering to its own rules and procedures and to the requirements of the Administrative Procedure Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, and other applicable law, each agency shall develop its regulatory actions in a timely fashion and adhere to the following procedures with respect to a regulatory action:

(A) Each agency shall provide OIRA, at such times and in the manner specified by the Administrator of OIRA, with a list of its planned regulatory actions, indicating those which the agency believes are significant regulatory actions within the meaning of this Executive order. Absent a material change in the development of the planned regulatory action, those not designated as significant will not be subject to review under this section unless, within 10 working days of receipt

of the list, the Administrator of OIRA notifies the agency that OIRA has determined that a planned regulation is a significant regulatory action within the meaning of this Executive order. The Administrator of OIRA may waive review of any planned regulatory action designated by the agency as significant, in which case the agency need not further comply with subsection (a)(3)(B) or subsection (a)(3)(C) of this section.

(B) For each matter identified as, or determined by the Administrator of OIRA to be, a significant regulatory action, the issuing agency shall provide to OIRA:

- (i) The text of the draft regulatory action, together with a reasonably detailed description of the need for the regulatory action and an explanation of how the regulatory action will meet that need; and
- (ii) An assessment of the potential costs and benefits of the regulatory action, including an explanation of the manner in which the regulatory action is consistent with a statutory mandate and, to the extent permitted by law, promotes the President's priorities and avoids undue interference with State, local, and tribal governments in the exercise of their governmental functions.

(C) For those matters identified as, or determined by the Administrator of OIRA to be, a significant regulatory action within the scope of section 3(f)(1), the agency shall also provide to OIRA the following additional information developed as part of the agency's decision-making process (unless prohibited by law):

- (i) An assessment, including the underlying analysis, of benefits anticipated from the regulatory action (such as, but not limited to, the promotion of the efficient functioning of the economy and private markets, the enhancement of health and safety, the protection of the natural environment, and the elimination or reduction of discrimination or bias) together with, to the extent feasible, a quantification of those benefits;
- (ii) An assessment, including the underlying analysis, of costs anticipated from the regulatory action (such as, but not limited to, the direct cost both to the government in administering the regulation and to businesses and others in complying with the regulation, and any adverse effects on the efficient functioning of the economy, private markets (including productivity, employment, and competitiveness), health, safety, and the natural environment), together with, to the extent feasible, a quantification of those costs; and
- (iii) An assessment, including the underlying analysis, of costs and benefits of potentially effective and reasonably feasible alternatives to the planned regulation, identified by the agencies or the public (including improving the current regulation and reasonably viable nonregulatory actions), and an explanation why the planned regulatory action is preferable to the identified potential alternatives.

(D) In emergency situations or when an agency is obligated by law to act more quickly than normal review procedures allow, the agency shall notify OIRA as soon as possible and, to the extent practicable, comply with subsections (a)(3)(B) and (C) of this section. For those regulatory actions that are governed by a statutory or court-imposed deadline, the agency shall, to the extent practicable, schedule rule making proceedings so as to permit sufficient time for OIRA to conduct its review, as set forth below in subsection (b)(2) through (4) of this section.

(E) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, the agency shall:

- (i) Make available to the public the information set forth in subsections (a)(3)(B) and (C);
- (ii) Identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA for review and the action subsequently announced; and

(iii) Identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

(F) All information provided to the public by the agency shall be in plain, understandable language.

(b) *OIRA Responsibilities.* The Administrator of OIRA shall provide meaningful guidance and oversight so that each agency's regulatory actions are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order and do not conflict with the policies or actions of another agency. OIRA shall, to the extent permitted by law, adhere to the following guidelines:

(1) OIRA may review only actions identified by the agency or by OIRA as significant regulatory actions under subsection (a)(3)(A) of this section.

(2) OIRA shall waive review or notify the agency in writing of the results of its review within the following time periods:

(A) For any notices of inquiry, advance notices of proposed rulemaking, or other preliminary regulatory actions prior to a Notice of Proposed Rulemaking, within 10 working days after the date of submission of the draft action to OIRA;

(B) For all other regulatory actions, within 90 calendar days after the date of submission of the information set forth in subsections (a)(3)(B) and (C) of this section, unless OIRA has previously reviewed this information and, since that review, there has been no material change in the facts and circumstances upon which the regulatory action is based, in which case, OIRA shall complete its review within 45 days; and

(C) The review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director and (2) at the request of the agency head.

(3) For each regulatory action that the Administrator of OIRA returns to an agency for further consideration of some or all of its provisions, the Administrator of OIRA shall provide the issuing agency a written explanation for such return, setting forth the pertinent provision of this Executive order on which OIRA is relying. If the agency head disagrees with some or all of the bases for the return, the agency head shall so inform the Administrator of OIRA in writing.

(4) Except as otherwise provided by law or required by a Court, in order to ensure greater openness, accessibility, and accountability in the regulatory review process, OIRA shall be governed by the following disclosure requirements:

(A) Only the Administrator of OIRA (or a particular designee) shall receive oral communications initiated by persons not employed by the executive branch of the Federal Government regarding the substance of a regulatory action under OIRA review;

(B) All substantive communications between OIRA personnel and persons not employed by the executive branch of the Federal Government regarding a regulatory action under review shall be governed by the following guidelines: (i) A representative from the issuing agency shall be invited to any meeting between OIRA personnel and such person(s);

(ii) OIRA shall forward to the issuing agency, within 10 working days of receipt of the communication(s), all written communications, regardless of format, between OIRA personnel and any person who is not employed by the executive branch of the Federal Government, and the dates and names of individuals involved in all substantive oral communications (including meetings to which an agency representative was invited, but did not attend, and telephone conversations between OIRA personnel and any such persons); and

(iii) OIRA shall publicly disclose relevant information about such communication(s), as set forth below in subsection (b)(4)(C) of this section.

(C) OIRA shall maintain a publicly available log that shall contain, at a minimum, the following information pertinent to regulatory actions under review:

- (i) The status of all regulatory actions, including if (and if so, when and by whom) Vice Presidential and Presidential consideration was requested;
- (ii) A notation of all written communications forwarded to an issuing agency under subsection (b)(4)(B)(ii) of this section; and
- (iii) The dates and names of individuals involved in all substantive oral communications, including meetings and telephone conversations, between OIRA personnel and any person not employed by the executive branch of the Federal Government, and the subject matter discussed during such communications.

(D) After the regulatory action has been published in the **Federal Register** or otherwise issued to the public, or after the agency has announced its decision not to publish or issue the regulatory action, OIRA shall make available to the public all documents exchanged between OIRA and the agency during the review by OIRA under this section.

(5) All information provided to the public by OIRA shall be in plain, understandable language.

Sec. 7. Resolution of Conflicts. To the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials). Vice Presidential and Presidential consideration of such disagreements may be initiated only by the Director, by the head of the issuing agency, or by the head of an agency that has a significant interest in the regulatory action at issue. Such review will not be undertaken at the request of other persons, entities, or their agents.

Resolution of such conflicts shall be informed by recommendations developed by the Vice President, after consultation with the Advisors (and other executive branch officials or personnel whose responsibilities to the President include the subject matter at issue). The development of these recommendations shall be concluded within 60 days after review has been requested.

During the Vice Presidential and Presidential review period, communications with any person not employed by the Federal Government relating to the substance of the regulatory action under review and directed to the Advisors or their staffs or to the staff of the Vice President shall be in writing and shall be forwarded by the recipient to the affected agency(ies) for inclusion in the public docket(s). When the communication is not in writing, such Advisors or staff members shall inform the outside party that the matter is under review and that any comments should be submitted in writing.

At the end of this review process, the President, or the Vice President acting at the request of the President, shall notify the affected agency and the Administrator of OIRA of the President's decision with respect to the matter.


Sec. 8. Publication. Except to the extent required by law, an agency shall not publish in the **Federal Register** or otherwise issue to the public any regulatory action that is subject to review under section 6 of this Executive order until (1) the Administrator of OIRA notifies the agency that OIRA has waived its review of the action or has completed its review without any requests for further consideration, or (2) the applicable time period in section 6(b)(2) expires without OIRA having notified the agency that it is returning the regulatory action for further consideration under section 6(b)(3), whichever occurs first. If the terms of the preceding sentence have not been satisfied and an agency wants to publish or otherwise issue a

regulatory action, the head of that agency may request Presidential consideration through the Vice President, as provided under section 7 of this order. Upon receipt of this request, the Vice President shall notify OIRA and the Advisors. The guidelines and time period set forth in section 7 shall apply to the publication of regulatory actions for which Presidential consideration has been sought.

Sec. 9. Agency Authority. Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law.

Sec. 10. Judicial Review. Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

Sec. 11. Revocations. Executive Orders Nos. 12291 and 12498; all amendments to those Executive orders; all guidelines issued under those orders; and any exemptions from those orders heretofore granted for any category of rule are revoked.



THE WHITE HOUSE,
September 30, 1993.

Federal Register

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Friday, January 21, 2011

Presidential Documents

Title 3—

Executive Order 13563 of January 18, 2011

The President

Improving Regulation and Regulatory Review

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to improve regulation and regulatory review, it is hereby ordered as follows:

Section 1. *General Principles of Regulation.* (a) Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements.

(b) This order is supplemental to and reaffirms the principles, structures, and definitions governing contemporary regulatory review that were established in Executive Order 12866 of September 30, 1993. As stated in that Executive Order and to the extent permitted by law, each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(c) In applying these principles, each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Sec. 2. *Public Participation.* (a) Regulations shall be adopted through a process that involves public participation. To that end, regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.

(b) To promote that open exchange, each agency, consistent with Executive Order 12866 and other applicable legal requirements, shall endeavor to provide the public with an opportunity to participate in the regulatory process. To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally

be at least 60 days. To the extent feasible and permitted by law, each agency shall also provide, for both proposed and final rules, timely online access to the rulemaking docket on regulations.gov, including relevant scientific and technical findings, in an open format that can be easily searched and downloaded. For proposed rules, such access shall include, to the extent feasible and permitted by law, an opportunity for public comment on all pertinent parts of the rulemaking docket, including relevant scientific and technical findings.

(c) Before issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.

Sec. 3. *Integration and Innovation.* Some sectors and industries face a significant number of regulatory requirements, some of which may be redundant, inconsistent, or overlapping. Greater coordination across agencies could reduce these requirements, thus reducing costs and simplifying and harmonizing rules. In developing regulatory actions and identifying appropriate approaches, each agency shall attempt to promote such coordination, simplification, and harmonization. Each agency shall also seek to identify, as appropriate, means to achieve regulatory goals that are designed to promote innovation.

Sec. 4. *Flexible Approaches.* Where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. These approaches include warnings, appropriate default rules, and disclosure requirements as well as provision of information to the public in a form that is clear and intelligible.

Sec. 5. *Science.* Consistent with the President's Memorandum for the Heads of Executive Departments and Agencies, "Scientific Integrity" (March 9, 2009), and its implementing guidance, each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions.

Sec. 6. *Retrospective Analyses of Existing Rules.* (a) To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.

(b) Within 120 days of the date of this order, each agency shall develop and submit to the Office of Information and Regulatory Affairs a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.

Sec. 7. *General Provisions.* (a) For purposes of this order, "agency" shall have the meaning set forth in section 3(b) of Executive Order 12866.

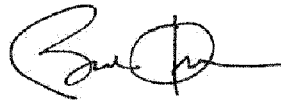
(b) Nothing in this order shall be construed to impair or otherwise affect:

(i) authority granted by law to a department or agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
January 18, 2011.

[PR Doc. 2011-1385
Filed 1-20-11; 8:45 am]
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Federal Register

Vol. 76, No. 135

Thursday, July 14, 2011

Presidential Documents

Title 3—

Executive Order 13579 of July 11, 2011

The President

Regulation and Independent Regulatory Agencies

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to improve regulation and regulatory review, it is hereby ordered as follows:

Section 1. Policy. (a) Wise regulatory decisions depend on public participation and on careful analysis of the likely consequences of regulation. Such decisions are informed and improved by allowing interested members of the public to have a meaningful opportunity to participate in rulemaking. To the extent permitted by law, such decisions should be made only after consideration of their costs and benefits (both quantitative and qualitative).

(b) Executive Order 13563 of January 18, 2011, “Improving Regulation and Regulatory Review,” directed to executive agencies, was meant to produce a regulatory system that protects “public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.” Independent regulatory agencies, no less than executive agencies, should promote that goal.

(c) Executive Order 13563 set out general requirements directed to executive agencies concerning public participation, integration and innovation, flexible approaches, and science. To the extent permitted by law, independent regulatory agencies should comply with these provisions as well.

Sec. 2. Retrospective Analyses of Existing Rules. (a) To facilitate the periodic review of existing significant regulations, independent regulatory agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data and evaluations, should be released online whenever possible.

(b) Within 120 days of the date of this order, each independent regulatory agency should develop and release to the public a plan, consistent with law and reflecting its resources and regulatory priorities and processes, under which the agency will periodically review its existing significant regulations to determine whether any such regulations should be modified, streamlined, expanded, or repealed so as to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.

Sec. 3. General Provisions. (a) For purposes of this order, “executive agency” shall have the meaning set forth for the term “agency” in section 3(b) of Executive Order 12866 of September 30, 1993, and “independent regulatory agency” shall have the meaning set forth in 44 U.S.C. 3502(5).

(b) Nothing in this order shall be construed to impair or otherwise affect:

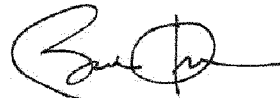
(i) authority granted by law to a department or agency, or the head thereof; or

(ii) functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(c) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

41588 Federal Register / Vol. 76, No. 135 / Thursday, July 14, 2011 / Presidential Documents

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
July 11, 2011.

[PR Doc. 2011-17533
Filed 7-13-11; 11:15 am]
Billing code 3195-W1-P

Mr. CONYERS. And in compliance with these directives, executive agencies and various independent regulatory agencies have submitted retrospective review plans. All together, these plans have identified numerous ways to reduce redundancy and inconsistency among existing regulations.

As the Coalition for Sensible Safeguards notes, the commission would itself be redundant and duplicative in light of the President's executive orders. It should be noted that this process comes in addition to the ongoing retrospective review efforts that agencies have been undertaking even before the issuance of these executive orders.

As the Government Accountability Office reported in 2007, agencies routinely conduct these often at their own initiative, and to that end, the GAO has made several recommendations to improve that process, which would have been a good starting place for any analysis.

Unfortunately, we have a one-sided, unbalanced approach that has been alluded to by the Ranking Member from Georgia on this Subcommittee, Hank Johnson. As a threshold matter, the commission is plainly unconstitutional, as will be explained very shortly, because it empowers the commission to take actions that would have the force of law in violation of the Constitution's Appointment Clause. And I will let him handle that from there.

Virtually all of the bill's objectives have this one-way approach. It is a measure designed to result in the repeal or amendment of a rule only to eliminate or reduce costs. In contrast, the bill does not do anything—very little or nothing—to promote actions that would enhance the benefits of rules.

Another point that I might want to make is that the commission members, other than the chair, would not be required to have any expertise in either administrative law matters or the subject matter of the rules that they consider. Notwithstanding that fact, the commission would be empowered to second guess Congress with respect to the need for certain rules, as well as the agencies with respect to the science and analysis warranting such rule.

And the most grievous part of the bill is the so-called cut-go offsetting provisions, which comes into play even if Congress enacted a joint resolution to disapprove the commission's report.

Now, after all of that, I am amazed that we are here today. I can sympathize with the Chairman of this Subcommittee, as does the Ranking Member, because he is held in high esteem by his colleagues on both sides of the aisle. But this legislation; this provisional draft is hardly a way for us to start an important hearing like this.

And I submit the rest of my statement and I yield back the balance of my time.

[The information referred to follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

In principle, retrospective review of existing regulations is not a bad idea. It is hard to argue against the notion that agencies should periodically assess whether the rules they have promulgated are as good as they can be or whether they are even necessary in light of changed circumstances.

Nonetheless, there are certain considerations that we must keep in mind as we proceed with today's hearing.

To begin with, President Obama has already taken a series of significant steps towards instituting regular retrospective reviews by agencies.

To date, he has issued two Executive Orders outlining steps that federal agencies must take to formulate plans for retrospective review of their regulations on an ongoing basis.

And, he has issued a third Executive Order encouraging independent regulatory agencies to take similar steps to plan for ongoing retrospective reviews of their rules.

In compliance with these directives, executive agencies and various independent regulatory agencies have submitted retrospective review plans.

Altogether, these plans have identified numerous ways to reduce redundancy and inconsistency among existing regulations.

As the Coalition for Sensible Safeguards notes, the Commission would itself be redundant and duplicative" in light of the President's executive orders.

It should be noted that this process comes *in addition* to the ongoing retrospective review efforts that agencies have been undertaking even before the issuance of these executive orders.

As the Government Accountability Office reported in 2007, agencies routinely conduct these, often at their own initiative. To that end, the GAO made several recommendations to improve that process, which would have been a good starting place for any analysis.

Accordingly, I see no reason for Congress to jump the gun in seeking to mandate retrospective review legislatively.

At the minimum, before Congress considers imposing a legislative mandate regarding retrospective review, it should ensure that the President's efforts have been thoroughly evaluated and have had a chance to fully take root.

Turning to the so-called SCRUB Act, it has numerous flaws.

As a threshold matter, the Commission is "plainly unconstitutional," as Professor Levin explains in his prepared testimony. The legislation empowers the Commission to take actions that would have the force of law in violation of the Constitution's Appointments Clause.

Second, the bill unfortunately reflects a one-sided, unbalanced approach to retrospective review.

For example, virtually all of the bill's objectives and mechanisms are a "one-way" ratchet. The measure is designed to result in the repeal or amendment of a rule *only* to eliminate or reduce costs.

In contrast, the bill does absolutely nothing to promote actions that would enhance the benefits of rules.

Another problem with the bill is that the Commission members—other than the Commission chair—would not be required to have *any* expertise in either administrative law matters or the subject matter of the rules that they consider.

Notwithstanding that fact, the Commission would be empowered to second guess Congress with respect to the need for certain rules as well as the agencies with respect to the science and analysis warranting such rules.

Worse yet, the bill's so-called "cut-go" offsetting provisions would come into play even if Congress enacted a joint resolution to disapprove the Commission's report.

Finally, we must acknowledge what the real intent of this legislation is.

This is yet another attempt to hobble the ability of agencies to regulate and thereby prevent them from protecting public health and safety based on unsubstantiated rhetoric that regulations inhibit economic development.

Just yesterday, our Republican colleague, Bill Shuster, tweeted: "As Americans, we should all feel safe to drink the water that comes out of our faucets."

Right now, do the citizens of West Virginia and North Carolina feel it is safe to drink their water?

Did the contamination result from too much regulation?

What balance should be struck between preventing carcinogens from appearing in our Nation's water supply and the cost of regulatory compliance?

Do we want an unelected group of Commissioners to second guess the legislative priorities of Congress and the scientific expertise of agencies when it comes to safe drinking water standards?

These are just some of the major concerns that I have about this legislation.

Mr. BACHUS. I thank you, Mr. Chairman—Mr. Ranking Member, who I still call "Mr. Chairman" when I served under you.

We have a very distinguished panel today. I would like to introduce the witnesses. Dr. Patrick McLaughlin is Senior Research Fellow at the Mercatus Center at George Mason University. His research focuses on regulations and the regulatory process, with additional interest in environmental economics, international trade, industrial organization, and transportation economics. His research and opinions are regularly published.

Prior to joining Mercatus, Dr. McLaughlin served as Senior Economist at the Federal Railroad Administration in the United States Department of the Transportation. As a former railroad attorney in Congress, you know, railroads is probably my favorite subject. I have followed your work there and appreciate your work in the field of railroad transportation. Very few people understand the railroads, understand the tremendous economic benefit they bring. They really keep our economy rolling, and they are one of the least understood modes of transportation. I still get questions all the time by people saying do the passenger trains and the freight trains run on the same line. Normally the answer is yes, but sometimes it is no.

Dr. McLaughlin has published in the fields of law and economics, public choice, environmental economics, and international trade. He holds a Ph.D. in economics from Clemson University. So thank you.

Mr. Sam Batkins is Director of Regulatory Policy at the American Action Forum. Mr. Batkins' research focuses on the rule-making efforts of administrative agencies and the related efforts of Congress. His work has appeared in the "Wall Street Journal," the "New York Times," "The Hill," "National Review Online," "Reuters," and the "Washington Post," among other publications. In fact, you just recently published a study that has drawn quite a lot of publicity, and there are some rather important findings.

Prior to joining the Forum, Mr. Batkins worked at the U.S. Chamber of Commerce, Institute of Legal Reform, and the National Taxpayers Union. At the U.S. Chamber, he focused on lawsuit abuse, tort reform, and Federal regulation. At the National Taxpayers Union, he focused on State and Federal spending.

Mr. Batkins received his B.A. in political science summa cum laude from Sewanee University of the South. He received his J.D. from Catholic University of America, Columbus School of Law. And we welcome you before our Committee.

Mr. Ronald Levin, who has testified before our Committee on several occasions, is the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis. He is co-author of a case book, State and Federal Administrative Law.

Professor Levin has chaired the section of administrative law and regulatory practice of the American Bar Association, a group to which he is still an active member. He served as the ABA's advisor to the drafting committee to revise the Model State Administrative Procedure Act.

Professor Levin also serves as a public member of the Administrative Conference of the United States and the chair of its Judicial Review Committee.

Professor Levin clerked for the Honorable John Godbold of the U.S. Court of Appeals for the Fifth Circuit and practiced with the Washington, D.C. firm of Sutherland, Asbill and Brennan.

He received his B.A. from Yale and his J.D. from the University of Chicago, quite a distinguished academic institution.

And that was with the Fifth Circuit in New Orleans?

Mr. LEVIN. It is now, but at the time—

Mr. BACHUS. It was in Atlanta?

Mr. LEVIN. So the situation is that the Fifth Circuit was broken into two. So at the time of my clerkship, Judge Godbold was on the Fifth Circuit. Then after the break, he was on the Eleventh Circuit, so he was the only judge who has ever been chief judge of two circuits.

Mr. BACHUS. So he is in Atlanta now.

Mr. LEVIN. At that time, his chambers were in Montgomery. The base was New Orleans.

Mr. BACHUS. Thank you. I knew, obviously, he is a very distinguished jurist.

We will now proceed under the 5-minute rule with questions. And I am going to recognize Mr. Smith for 5 minutes, if you are ready to proceed. I should have given you some warning.

Mr. SMITH OF MISSOURI. Are they going to testify first?

Mr. BACHUS. That is what Barney Frank used to do all the time. Now I am doing it. I guess it must catch. I cannot believe I did that.

Yes. Mr. McLaughlin, if you can begin your testimony. I will have to quit following this script.

TESTIMONY PATRICK McLAUGHLIN, Ph.D., SENIOR RESEARCH FELLOW, MERCATUS CENTER, GEORGE MASON UNIVERSITY

Mr. McLAUGHLIN. Thank you. Chairman Bachus, Ranking Member Johnson, and Members of the Committee, thank you for inviting me. As an economist and senior research fellow at the Mercatus Center at George Mason University, my primary research focuses on regulatory accumulation and the regulatory process. So it is my pleasure to testify on today's topic.

The accumulated stock of regulations almost certainly contains a multitude of unnecessary burdens. As the title of the discussed legislation implies, the current regulatory system makes it difficult to identify and eliminate such unnecessary burdens.

Our goal here today should be to ascertain whether the SCRUB Act would succeed where previous efforts have failed.

To that end, first I will discuss why regulatory accumulation is a problem, which is primarily that it creates substantial drag on economic growth.

Second, I will discuss the search for obsolete, unnecessary, duplicative, or otherwise non-functional regulations covering both why similar searches in the past have failed and what could be done differently to increase the odds of success. In my estimation, an independent commission, as opposed to regulatory agencies, is required to successfully identify non-functional rules.

Third, I will address the difficulties of eliminating non-functional rules once identified. Here I point to the wisdom of the crafters of the BRAC process.

Finally, I will cover specific recommendations for effectively reducing the problem of regulatory accumulation, recommendations that are directly relevant to the SCRUB Act.

By design, regulations restrict choices. These restrictions have accumulated for decades, exceeding 1 million by the year 2010. This accretion of restrictions is what I refer to as regulatory accumulation. Regulatory accumulation inhibits innovation. And I am not just talking about business ideas that would create new products and jobs. Would-be entrepreneurs are sometimes prohibited from pursuing ideas that could improve the environment and consumers' quality of life. My written testimony gives a couple real-world examples of how regulations can actually deter environmental stewardship and prevent companies from implementing potentially lifesaving technologies, which I would be happy to discuss.

Through lost innovation and entrepreneurship, regulatory accumulation negatively affects economic growth. An academic study found that between 1949 and 2005, the accumulation of Federal regulations has slowed economic growth by an average of 2 percent per year. Over a 57-year period, that adds up to about \$277,000 in lost annual income per household.

So how can we fix the regulatory accumulation problem? The solution boils down to two elements. First, we must identify non-functional rules. Second, once identified, non-functional rules should be eliminated or modified. In my written testimony, I have identified 11 elements that my research with my colleague, Richard Williams, identifies as characteristics of successful regulatory reform. I want to highlight just three.

First, the process should entail independent assessment of regulations. Independence is crucial. Our study documents attempts by every Administration since Reagan's to address regulatory accumulation. Those attempts share at least two characteristics.

Each of them relied, at least partially, on agencies to assess their own stocks of regulations, and each of them failed in substantively changing the stock of regulations or the ongoing accumulative process. If the reasons for these efforts' limited success is the reliance on agency self-assessment, then an independent commission could be a better alternative.

Second, the process should use a standard method of assessment, and that method should include a focus on whether and how rules lead to the outcomes desired. There is a difference between outcomes and outputs. A rule may lead to an increase in an output such as increased safety inspections, but that does not guarantee that there has been an increase in the outcome, safety. The assessment of rules should focus on outcomes.

Third, congressional action, such as a joint resolution of disapproval, should be required in order to stop the commission's recommendations. I previously mentioned the wisdom of the crafters of the BRAC process. Legislation addressing regulatory accumulation must overcome similar obstacles as the BRAC process did. One of those is the possibility of congressional inaction. In order to stop the recommendations put forth by the BRAC commission, the BRAC process required Congress to pass a joint resolution of disapproval. In other words, even if Congress did nothing, the default was implementation of the recommendations.

These are three of the 11 elements that our research has identified as essential to success.

Regulatory accumulation in the U.S., with its adverse impact on economic growth, is now a widely recognized problem. The problem has not been meaningfully addressed despite the efforts of several Administrations. My written testimony covers other essential elements that my research indicates are necessary, and I have highlighted just three now.

I would be happy to answer any questions after this is finished. Thank you.

[The prepared statement of Mr. McLaughlin follows:]



MERCATUS CENTER
George Mason University

Bridging the gap between academic ideas and real-world problems

TESTIMONY

THE SEARCHING FOR AND CUTTING REGULATIONS THAT ARE UNNECESSARILY BURDENSOME ACT OF 2014

BY PATRICK A. MCLAUGHLIN

House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial, and Antitrust Law

February 11, 2014

Chairman Bachus, Ranking Member Johnson, and members of the committee: thank you for inviting me to testify today. As an economist and senior research fellow at the Mercatus Center at George Mason University, my primary research focuses on regulatory accumulation and the regulatory process, so it is my pleasure to testify on today's topic.

The accumulated stock of regulations contains a multitude of unnecessary burdens. As the title of the legislation that is the subject of this hearing implies, the current regulatory system makes it difficult to identify and eliminate such unnecessary burdens.

In examining the reforms under consideration, first, I will discuss why regulatory accumulation is a public policy problem: regulatory accumulation creates substantial drag on economic growth by impeding innovation and entrepreneurship.

Second, I will discuss the search for obsolete, unnecessary, duplicative, or otherwise nonfunctional regulations, covering both why similar searches in the past have failed and what could be done differently to increase the odds of success. In my estimation, an independent group or commission is necessary to successfully identify unnecessary regulatory burdens.

Third, I will address the difficulties of eliminating unnecessary regulatory burdens, once identified. Here I point to the wisdom of the crafters of the BRAC process.

Finally, I will cover specific recommendations for effectively reducing the problem of regulatory accumulation and compare the SCRUB Act to these recommendations.

For more information or to meet with the scholars, contact
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Mercatus Center at George Mason University, 3434 Washington Boulevard, 4th Floor, Arlington, VA 22201

The views presented in this document do not represent official positions of the Mercatus Center or George Mason University.

Figure 1. Total Number of Pages in the Code of Federal Regulations, 1975–2012



1. "UNNECESSARILY BURDENSOME": THE CONSEQUENCES OF REGULATORY ACCUMULATION

Regulatory accumulation may be a term that few people understand, although its consequences can be substantial. It is worthwhile to define what I mean by the terms "regulation" and "regulatory accumulation." As I have written in previous congressional testimony, regulations restrict choices by design.¹ In its most basic definition, a regulation is a law that "seeks to change *behavior* in order to produce desired *outcomes*," and it does this by requiring or forbidding certain actions.² Federal regulations, published in the *Code of Federal Regulations*, can place restrictions on the choices of individuals, large manufacturers, high-tech startups, small businesses, state and local governments, and even the federal government itself.

Measuring Regulatory Accumulation

Federal regulation in the United States has consistently grown for decades. One way to measure the growth of federal regulation is to count the number of pages published each year in the *Code of Federal Regulations*. The *Code of Federal Regulations* is published annually and contains the legal text of all federal regulations in effect each year. That means one can simply look at the number of pages published in the *Code of Federal Regulations* in a given year to get a rough approximation of the extent and complexity of all federal regulations in effect in that year. Figure 1 shows the number of pages published in the *Code of Federal Regulations* each year from 1975 to 2012.

As figure 1 shows, the number of pages published in the *Code of Federal Regulations* has grown over the tenures of all recent presidents. In 1975, there were 71,224 pages of regulation. In 2012, 174,545 pages of regulation were published.³

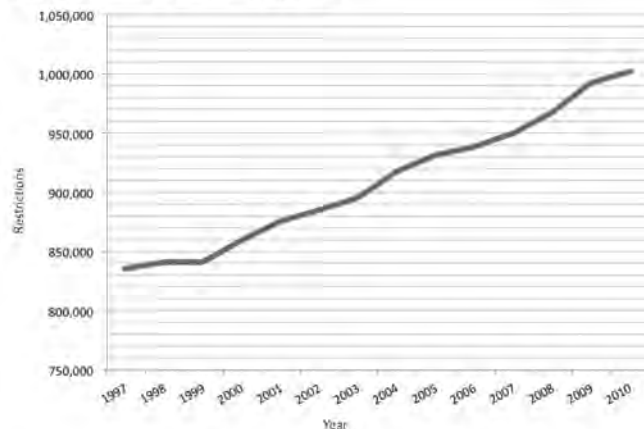
Of course, not all pages are the same. Another way to assess the extent and complexity of federal regulation is to look at the actual number of restrictions—words that create binding, legal obligations either to do something or

1. Significant portions of this section are taken or adapted from testimony given before the Senate Judiciary Committee, Subcommittee on Oversight, Federal Rights, and Agency Action in August 2013. Patrick A. McLaughlin, "On the Human Costs of the US Regulatory System: Should Congress Pressure Agencies to Make Rules Faster?," http://mercatus.org/sites/default/files/McLaughlin_human-costs_testimony_073013.pdf.

2. Cary Coglianese, "Measuring Regulatory Performance: Evaluating the Impact of Regulation and Regulatory Policy," Expert Paper No. 1, Organisation for Economic Co-operation and Development, 2012, http://www1.oecd.org/regreform/regulatory-policy/1_coglianese%20web.pdf.

3. Source: <https://www.federalregister.gov/uploads/2013/05/OFR-STATISTICS-CHARTS-ALL1-1-1.pdf>.

Figure 2. Total Number of Restrictions, 1997–2010



not to do something, such as “shall,” “must,” and “may not.” This permits a more narrow focus on the components of regulatory text that are truly restrictive, as opposed to, for example, text that merely provides information or opinion. In a project called RegData, made publicly available on the website of the Mercatus Center at George Mason University, economics professor Omar Al-Ubaydli and I have done exactly that.⁴ Figure 2 shows the total number of regulatory restrictions published in regulatory text in the *Code of Federal Regulations* from 1997 to 2010.

Figure 2 corroborates the impression given by figure 1: regulation has been consistently growing. Moreover, these measures of regulation allow economists to study the consequences of the accumulation of regulation.

The Consequences of Regulatory Accumulation

The buildup of regulations—regulatory accumulation—has economic consequences. When regulations are created in reaction to major events, “new rules are [placed] on top of existing reporting, accounting, and underwriting requirements. . . . For each new regulation added to the existing pile, there is a greater possibility for interaction, for inefficient company resource allocation, and for reduced ability to invest in innovation. The negative effect on US industry of regulatory accumulation actually compounds on itself for every additional regulation added to the pile.”⁵

A. Compliance Costs

In all cases, regulatory intervention in the market is costly. According to the Office of Management and Budget, the cost of compliance with federal regulations alone—that is, the cost that regulations directly impose on regulated entities—likely totals in the tens of billions of dollars annually.⁶ A simple example of direct compliance costs is the

4. Al-Ubaydli, Omar, and Patrick McLaughlin, “RegData: A Numerical Database on Industry-Specific Regulations for All US Industries and Federal Regulations, 1997–2010” (Mercatus Working Paper No. 12-20, Mercatus Center at George Mason University, Arlington, VA, 2012), and <http://regdata.mercatus.org>.

5. Michael Mandel and Diana Carew, “Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform” (Washington, DC: Progressive Policy Institute, 2013), 3–4.

6. Office of Mgmt. and Budget, Exec. Office of the President, Draft 2012 Report to Congress on the Benefits and Costs of Federal Regulation and Unfunded Mandates on State, Local, and Tribal Entities (2012), available at http://www.whitehouse.gov/sites/default/files/omb/oir/draft_2012_cost_benefit_report.pdf.

fee regulated professionals, such as stockbrokers, must pay to obtain licenses when those licenses are required by regulations.⁷ But some compliance costs are surprising. For example, restaurants sometimes must pay to have food inspectors perform inspections in the evening, when the restaurant is open, instead of during the day when food inspectors typically work.⁸

B. Opportunity Costs—Forgone Innovation and Entrepreneurship

In addition to money outlays to pay compliance costs, regulation necessarily results in what economists call “opportunity costs”—productive activity forgone because scarce resources are devoted to regulatory compliance. If a restaurant owner has to spend an evening showing the food inspector around, the owner cannot spend that same time greeting customers and ensuring that they have a quality dining experience. Whatever resources are devoted to regulatory compliance could have been used in other ways, and the forgone return on the most valuable of these other potential uses represents an additional cost of regulation—above and beyond the compliance cost alone.

C. Example: Regulatory Inhibition of Potentially Life-Saving Innovation

The accumulation of restrictions over time also means individuals in the economy have less liberty to entrepreneurially seize an opportunity, less control over the uses of their own resources, and less ability to innovate. This means would-be entrepreneurs are sometimes prohibited from creating a new product that could potentially improve consumers’ quality of life or even save lives. For example, the National Highway Traffic Safety Administration (NHTSA) has regulations restricting how headlights on cars can be designed. While those NHTSA regulations allow headlights to automatically switch between high and low beam and swivel to shine light around a curve in the road, they do not allow designers to implement any sort of adaptive setting that could dim the high beam only at the appropriate spots in the road. One major reason why cars have low beams is so that drivers can switch to low beams when another car is approaching. Without switching from high beams, the oncoming driver can be temporarily blinded. Of course, there are still other potential hazards, obstacles, and people on other parts of the road. While switching to low beams has the benefit of not blinding the oncoming driver, it has the cost of reducing visibility, particularly on the sides of the road. Toyota, Mercedes, and Audi have all created systems that dim only a select portion of the high beam when another car is approaching. This selective dimming allows the driver to still see the sides of the road, where pedestrians may be walking, while simultaneously keeping the high beams from blinding oncoming drivers. While these systems have been built and sold in Europe and Asia, they cannot be sold in the United States because of NHTSA regulations.⁹ This entrepreneurial innovation could have happened in the United States; more importantly, these adaptive headlights could save some pedestrians’ lives.

D. Example: Regulatory Inhibition of Green Entrepreneurship

The city of Logan, Utah, recently experienced a more subtle example of how regulations can inhibit entrepreneurial activity. In 2004, the city began considering the installation of a “micro-hydropower” turbine in the city’s culinary water system.¹⁰ Micro-hydropower systems often do not require dams, thus reducing their environmental impact on the river’s ecology. Instead, water from a river is typically diverted into a pipeline, where a waterwheel or turbine produces electricity from the kinetic energy in the flowing water. Conceptually, a micro-hydro system can be thought of as a waterwheel placed in a pipeline. That was the case for Logan’s project—in fact, there was already a pipeline and water from a river was already diverted into the pipeline, and a building was already in a

7. FINRA requires “General Securities Representatives” to pass a Series 7 exam. See <http://www.finra.org/Industry/Compliance/Registration/QualificationsExams/Qualifications/P011051>.

8. See *Regulation Nightmares*, CNN Money (Sept. 22, 2011), http://money.cnn.com/galleries/2011/smallbusiness/1109/gallery.regulation_nightmares/4.html.

9. Gabe Nelson, “Toyota Puts High Beams on Headlight Regulation,” *Automotive News*, May 13, 2013, <http://www.autonews.com/article/20130513/OEM11/305139967#axzz2a4R2r6ou>.

10. Megan E. Hansen, Randy T. Simmons, Ryan M. Yonk, and Ken J. Sim, “Logan City’s Adventures in Micro-Hydropower: How Federal Regulations Discourage Renewable Energy Development” (Mercatus Working Paper No. 13-24, Mercatus Center at George Mason University, Arlington, VA, 2013).

location on the pipeline that could house the micro-hydro turbine. This project could create green power for 185 local homes, without any environmental impacts from the construction.¹¹

Unfortunately, while the idea initially appeared economically feasible, Logan City learned the hard way not to undertake any new entrepreneurial projects of similar size or scope, even if (or perhaps especially if) the project involves the preservation of the environment. The city ran into a “federal nexus of regulation,” resulting in years of waiting for permits, unnecessary testing, and ultimately delay on the delivery of an environmentally friendly source of electricity. As policy analyst Megan Hansen and economists Randy Simmons, Ryan York, and Ken Sim wrote on the subject,

Many of the same regulations designed to protect the environment created obstacles for Logan City’s environmentally friendly micro-hydro project. The Endangered Species Act (ESA) required [Logan City project engineer Lance] Houser to show that the project would not adversely affect any species or habitat listed under the act “on a project that disturbed nothing outside of an existing building” (personal communication [with Houser], December 12, 2012). FERC requires permit applicants to complete a draft biological assessment to “address project effects on federally listed or proposed species or critical habitat in the project vicinity” (FERC 2008, 11). In Logan City’s case, this requirement meant conducting analysis to show that the county’s three species listed as “candidate” species, one as in “recovery,” and three as “threatened” would not be harmed by the project (U.S. Fish & Wildlife Service, n.d.). Although the ESA was intended to protect the environment, in Logan City’s case it ended up creating obstacles for an environmentally friendly project.

Because of the costs of navigating the complex web of federal regulations, a project that should have taken about one year to complete at a maximum cost of \$1,400,000 instead required four years and almost \$3,000,000. More importantly, Logan City’s hard lesson will make it, and perhaps other cities, adopt a much more skeptical attitude toward the economic feasibility of environmentally friendly entrepreneurship. As the city’s assistant engineer Lance Houser said after the completion of the project, because of “the cost of the permitting headache and the nightmare and the frustration of the process, there is no economic benefit to doing a project that size again” for Logan City.

E. Regulatory Accumulation and Economic Growth

Regulations like those that so frustrated Logan City have been accumulating at a fairly constant rate for more than half a century. As regulations accumulate and block off entrepreneurial choices and potential innovations, the economy suffers. Sustained economic growth depends on innovation and entrepreneurship. A study published last year in the *Journal of Economic Growth* added to the already substantial evidence supporting the point that regulatory accumulation slows economic growth by stifling innovation and entrepreneurship.¹² Using pages from the *Code of Federal Regulations* as its measure of the extent and complexity of federal regulations, this study found that between 1949 and 2005 the accumulation of federal regulations slowed economic growth by an average of 2 percent per year. Considering that economic growth is an exponential process, an average reduction of 2 percent over 57 years makes a big difference. A relevant excerpt tells just how big of a difference:

We can convert the reduction in output caused by regulation to more tangible terms by computing the dollar value of the loss involved. . . . In 2011, nominal GDP was \$15.1 trillion. Had regulation remained at its 1949 level, current GDP would have been about \$53.9 trillion, an increase of \$38.8 trillion. With about 140 million households and 300 million people, an annual loss of \$38.8 trillion converts to about \$277,100 per household and \$129,300 per person.¹³

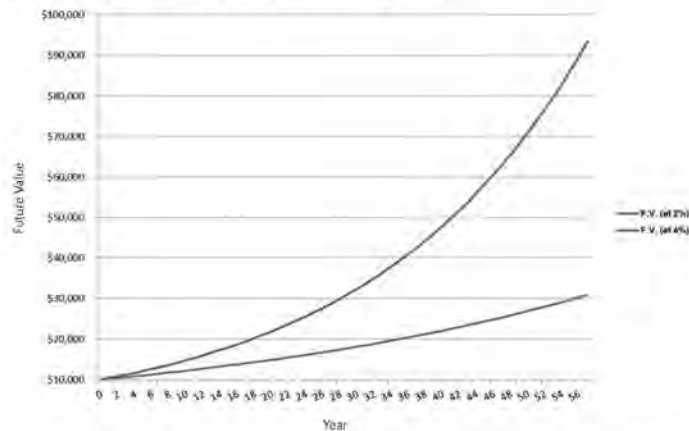
That’s \$277,100 per household in real goods, including health care, that were not produced and consumed because of federal regulation. That number seems almost too high to be believed, but, in fact, it is not out of line with a

11. *Ibid.*, 3.

12. John W. Dawson and John J. Seater, “Federal Regulation and Aggregate Economic Growth,” *Journal of Economic Growth* (2013): 1–41.

13. *Ibid.*, 22.

Figure 3. Growth Rate of Initial Investment (at 2.4% over 57 years)



number of other studies that have been produced by such organizations as the World Bank and the IMF, as well as by other scholars.¹⁴ To make more sense of it, consider retirement savings. People save for retirement by investing money in the present, in the hope that those investments will grow fast enough to allow a more comfortable retirement. So consider a case where your invested retirement savings grew 2 percent more slowly each year. How much less would you have when you retire? Invested retirement savings, like the economy, follow an exponential growth path. This means that the rate of growth in one year affects all future years. If you tuck away \$10,000 today, and your investments return 5 percent over the course of the next year, that means that you would have \$10,500 next year. If that \$10,500 returns 5 percent again in the following year, you would have \$11,025. On the other hand, if that \$10,000 returned only 3 percent in the first year, you would have \$10,300 at the end of that year. And if you received 3 percent again in the second year, at the end of the second year, you would have \$10,609.

Over the course of 57 years, a difference of 2 percent in the rate of growth leads to a substantial difference in outcomes. Figure 3 shows two growth paths for a sum of \$10,000 over a 57-year period—one path growing at 2 percent per year, and the other at 4 percent per year. After 57 years, that initial \$10,000 becomes more than \$93,500 when growing at a 4 percent annual rate. When slowed to an 2 percent annual growth rate, that \$10,000 grows to only about \$31,000 over the same timeframe.

The economy grows in a similar way. That is, the economy follows an exponential growth path. Goods, such as computers and machinery, that are produced in one year in the economy contribute to economic growth in the following year. Once that fact is realized, it is easier to understand how a 2 percent difference in economic growth can lead to households being \$277,100 poorer because of federal regulation.

Nonetheless, my points do not require you to believe that the total costs of federal regulation are that high. It is

14. For examples, see NV Loayze, AM Oviedo, and L. Servén, "The Impact of Regulation on Growth and Informality: Cross-Country Evidence" (AEI-Brookings Joint Center for Regulatory Studies, Related Publications, 05-11, 2005); Simeon Djankov, Carolee McLiesh, and Rita Maria Ramalho, "Regulation and Growth," *Economics Letters* 92.3 (2006): 395–401; C. Nicoletti et al., "Product and Labor Markets Interactions in OECD Countries" (OECD Economics Department Working Papers, No. 312, OECD, Paris, 2001); Giuseppe Nicoletti and Stefano Scarpetta, "Regulation, Productivity and Growth: OECD Evidence" *Economic Policy* 18, no. 36 (2003): 9–72; Alberto Alesina, Silvia Ardagna, Giuseppe Nicoletti, and Fabio Schiantarelli, "Regulation and Investment," *Journal of the European Economic Association* 3, no. 4 (2005): 791–825.

more important to understand the mechanisms that cause the accumulation of federal regulation to be costly. What exactly is it about regulatory accumulation that causes economic growth to slow?

Two lynchpins of economic growth—innovation and competition—can be negatively affected by regulations. Although even the best-crafted regulation can inhibit innovation, there is substantial evidence that inflexible regulations, like design standards requiring only high- and low-beam headlights and nothing in between, stifle innovation. For example, regulations that impose specific technologies—such as catalytic converters in vehicle exhaust systems or scrubbers in the smokestacks of power plants—offer no incentive or ability for companies to find alternative solutions that could achieve the same objective as the required technology.¹⁵ Conversely, incentive-based regulations, such as regulatory systems that create permits that are tradable in a market, or that set a performance standard without specifying a design or technology that must be used to achieve that performance standard, allow regulators to achieve an objective at lower cost. Of course, the fact that a regulatory program contains market-based incentives does not guarantee success in achieving desired outcomes. As one study on the topic of incentive-based regulation puts it, “whether any specific instrument is desirable depends on how it is designed and implemented.”¹⁶ Incentive-based regulations as a general rule do less harm to innovation than inflexible, command-and-control regulations, but even the best design cannot entirely mitigate a regulation’s consequences on innovation.

A recent study by economist Matt Mitchell (which I have attached) pointed out that regulations are sometimes used to grant privileges to favored companies, primarily by shielding them from competition.¹⁷ As examples, Mitchell notes that 36 states “require government permission to open or expand a health care facility,” and that 39 states “require government permission to set up shop as a hair braider.” When regulations make it harder for entrepreneurs to establish a particular type of business, incumbents in that line of business can charge higher prices or provide lower-quality products—they have less to fear from competitors because of the shield of regulation. Thus regulations sometimes serve to entrench incumbents and limit competition, to the detriment of economic growth.¹⁸ Protection from competition also serves to limit innovation. One study found that the companies that spent the most resources lobbying Congress and agencies for protective treatment tended to be “larger, older, less diversified, and less profitable” than those companies that did not lobby.¹⁹ Indeed, when there is a possibility of gaining protection from the government through lobbying efforts, some companies will divert scarce resources to doing so—necessarily decreasing the resources those companies can use for research and development, employee training, and other innovations that increase productivity.²⁰

F. Functional vs. Nonfunctional Rules

In a study released today, my colleague, Richard Williams, and I propose that regulations can be roughly divided into two categories, “functional” and “nonfunctional.”²¹ Functional rules address current, significant risks, mitigate some amount of those risks through compliance with the regulations, and do not have significant unintended effects or excessive compliance costs relative to their benefits. Nonfunctional rules are missing one or more of these features. The key to achieving significant amelioration of the problem of regulatory accumulation is first identifying as many nonfunctional rules as possible, and then either eliminating them or changing them so that they become functional.

15. Robert Hahn and Robert Stavins, “Incentive-Based Environmental Regulation: A New Era from an Old Idea,” *Ecology Law Quarterly* 18 (1991): 1–42.

16. Robert W. Hahn and Robert N. Stavins, “Economic Incentives for Environmental Protection: Integrating Theory and Practice,” *American Economic Review* 82, no. 2 (1992): 464–68.

17. Matthew Mitchell, “The Pathology of Privilege: The Economic Consequences of Government Favoritism” (Mercatus Research, Mercatus Center at George Mason University, Arlington, VA, 2012).

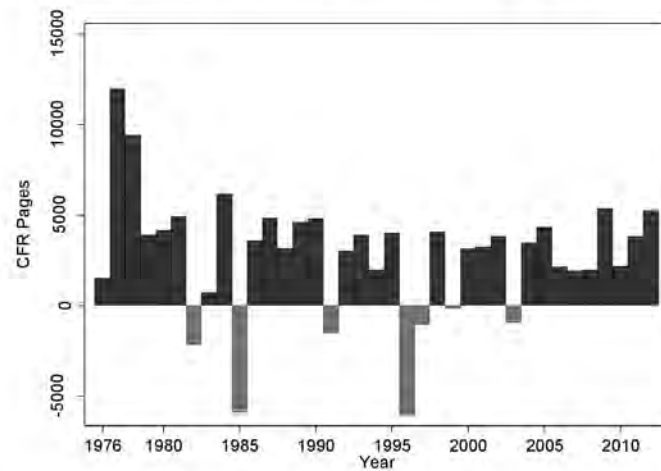
18. *Ibid.*, 19–21.

19. Stefanie Lenway, Randall Morck, and Bernard Young, “Rent Seeking, Protectionism and Innovation in the American Steel Industry,” *Economic Journal* 106 (1996): 410.

20. Chung-Lai Yang, “Rent Seeking, Technology Commitment, and Economic Development,” *Journal of Institutional and Theoretical Economics* 154, no. 4 (1998): 640–58.

21. Patrick A. McLaughlin and Richard Williams, “The Consequences of Regulatory Accumulation and a Proposed Solution” (Mercatus Working Paper No. 14-03, Mercatus Center at George Mason University, Arlington, VA, 2014).

Figure 4. Pages Added to or Subtracted from the Code of Federal Regulations, 1976–2012



2. "SEARCHING": HOW TO IDENTIFY NONFUNCTIONAL REGULATIONS

The need to eliminate or modify nonfunctional regulations from the accumulated stock has been widely recognized by members of Congress and every president since Carter.²² In his 2011 State of the Union Address, for example, President Obama noted, "There are twelve different agencies that deal with exports. There are at least five different agencies that deal with housing policy. Then there is my favorite example: the Interior Department is in charge of salmon while they are in fresh water, but the Commerce Department handles them when they're in saltwater. I hear it gets even more complicated when they are smoked."²³

Executive branch attempts to examine and revise or eliminate existing nonfunctional regulations have primarily relied on executive orders for review of the need for regulations, rather than creating a streamlined and evidence-based, analytical process that could accomplish large-scale reform. In the study I coauthored with Richard Williams (which I have attached), we examine previous efforts at regulatory cleanup led by every president since Reagan and conclude that these episodes yielded only marginal improvements at best. Most notably, none of these efforts resulted in either substantial reductions relative to the total size of the *Code of Federal Regulations* or sustained changes in the rate of adding new regulations to the *Code of Federal Regulations*.²⁴

Figure 4 shows just how little the regulatory process has changed, despite these presidential efforts. Since 1975, the *Code of Federal Regulations* (CFR) has expanded in 30 of 37 years. In those 30 expansionary years, 117,294 pages were added to the CFR. In contrast, in the seven contractive years, 17,871 pages were subtracted from the

22. Michael Mandel and Diana G. Carew, "Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform" (Policy Memo, Progressive Policy Institute, Washington, DC, May 2013), 3–4, <http://www.progressivepolicy.org/2013/05/regulatory-improvement-commission-a-politically-viable-approach-to-u-s-regulatory-reform/>.

23. Barack Obama, "Remarks by the President in State of Union Address," Jan. 25, 2011, Washington, DC (White House, Office of the Press Secretary), <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>.

24. McLaughlin and Williams, "Consequences of Regulatory Accumulation."

CFR—for net growth of nearly 100,000 pages. Previous efforts to eliminate obsolete regulations have removed only very small percentages of existing regulations from the books.

A significant problem presidents have been unable to overcome is the identification of rules to target for cleanup. Each of the executive branch efforts we examine in our study relied at least partially on regulatory agencies to identify potential target rules. However, as we wrote in our study,

Agencies often lack the information necessary to decide which regulations are obsolete, and they also lack the incentives to produce the necessary information. It's hard to imagine how any attempt to eliminate nonfunctional regulations—not just the latest attempt—could be successful without enough information to decide whether a regulation is nonfunctional in the first place.

A recent study demonstrates this. . . . [Economist Randall] Lutter thoroughly examines the results of the efforts of four agencies—EPA, FDA, the National Highway Traffic Safety Administration, and the Securities and Exchange Commission—in response to President Obama's retrospective review directives contained in Executive Orders 13563 and 13579. Although Executive Order 13563 specifically stipulates that the regulatory system “must measure, and seek to improve, the actual results of regulatory requirements,” Lutter finds little evidence of progress toward improving measurement (analysis) of actual results. Indeed, Lutter finds that very few retrospective analyses of existing regulations performed by these agencies even provide sufficient information to evaluate whether the benefits of continuing those regulations exceed their ongoing costs. This is the information problem for regulatory reform and the first obstacle. Agencies are not currently required by statute to analyze their existing regulations to determine ongoing costs and benefits or, more simply, even whether the regulations are effective.

Ideally, whether a rule or a regulatory program should be continued, modified, or eliminated would rely on research to indicate whether a systemic problem still exists; whether the rule continues to produce benefits exceeding costs; whether there are unintended consequences, such as countervailing risks, that have not been accounted for; whether additional regulations in the area (e.g., food safety) are likely to produce benefits exceeding costs; whether states and localities (or markets or courts) might be better able to address the problems; and whether the program continues to be a high federal priority. However, agencies tend to expend their resources not on researching these questions but on producing new rules that expand their budgets and control over their portion of the economy. Researching existing rules is not likely to ever be high on their agendas.²⁵

Similarly, individuals in agencies have little incentive to provide information that would lead to a rule's elimination or the choice not to produce a rule.²⁶ In general, employees—including economists—are professionally rewarded for being part of teams that create new regulations or expand existing regulatory programs.²⁷ Conversely, employees are rarely rewarded for deciding that a regulation should not be created. This is unfortunate, because specialists in agencies are likely to have some relevant information about which rules are nonfunctional.

In our study, we also examine other government reform efforts that have successfully overcome similar identification problems, such as the Base Realignment and Closure (BRAC) process:

In 1988, Congress created the Base Realignment and Closure (BRAC) Commission to address an impasse: nearly everyone agreed that toward the end of the Cold War, many military bases were no longer necessary,

25. *Ibid.*, referring to Randall Lutter, “The Role of Retrospective Analysis and Review in Regulatory Policy” (Mercatus Working Paper No. 12-14, Mercatus Center at George Mason University, Arlington, VA, April 2012).

26. McLaughlin and Williams, “Consequences of Regulatory Accumulation.”

27. Richard Williams, “The Influence of Regulatory Economists in Federal Health and Safety Agencies” (Working Paper No. 08-15, Mercatus Center at George Mason University, Arlington, VA, July 2008), http://mercatus.org/sites/default/files/publication/WP0815_Regulatory%20Economists.pdf. Williams quotes one economist as saying, “Success is putting out 10 regulations a year and bigger regulations are bigger successes.”

but no one could agree on which specific base(s) to close. This was because each base had a literal constituency and “designated champion” in Congress—the member from the base’s congressional district. Congress created the BRAC Commission and its process to overcome pork-barrel politics (which effectively would have prevented any bases from being closed) by requiring members to agree to abide by the recommendations of an independent commission—the BRAC Commission. The commission—composed of independent experts—was given a mission of assessing military bases primarily according to their military value, and, in conjunction with the Department of Defense, submitting a list of bases to Congress that would be recommended for closure or realignment based on their military value. As legal scholar Jerry Brito put it, “A clear mission (identify bases to be cut) along with guiding criteria (military need) positioned the commission to make empirically defensible choices.”²⁸

In hindsight, it sounds pretty simple. When everyone agreed that some bases needed to be eliminated, but no one could agree on which one, Congress created an independent commission and gave it a set of criteria with which to judge all bases’ usefulness. By putting the task of identification in the hands of independent arbiters, special-interest influence and parochialism were significantly reduced.

For similar reasons, we concluded that the identification of nonfunctional rules should be performed by an independent group—one with no reason to be interested in preserving certain rules or eliminating others, but instead with incentive to use a predetermined methodology to assess each rule according to guiding criteria.

3. “CUTTING”: HOW TO ELIMINATE OR MODIFY NONFUNCTIONAL RULES ONCE THEY ARE IDENTIFIED

Even if everyone can agree that regulatory accumulation has led to some nonfunctional rules harming the economy, and even if some of those nonfunctional rules could be identified, it is another step entirely to eliminate or modify them.

There will be resistance when it comes to the cutting stage of regulatory cleanup. Inevitably, there are winners and losers when regulations are created, regardless of the net economic effect of the rules. When a rule or set of rules is considered for elimination, those groups that benefited from the rule can be expected to coalesce and vociferously protest. Of course, eliminating regulations won’t be harmless to some of these groups, but the net effect will be positive. Some groups will have disproportionate influence. As a result, if members of Congress are given the option to consider which regulations to eliminate on a one-by-one basis, individual members who have constituencies or backers that benefit substantially from the regulation will fight to keep that regulation intact.

This is why it is necessary to consider a group of nonfunctional regulations at one time, similar to the approach that was successfully used in the BRAC process. The BRAC Commission would group all bases identified for closure under uniform criteria into a single list, with the default being elimination unless the entire list was disapproved by Congress. The only way Congress could stop the closure of all bases on the list was to pass a resolution of disapproval.²⁹ Similar to military bases, regulations’ costs are widely dispersed across the population while their benefits are concentrated in narrow groups. This situation can lead to calls for a specific regulation to be preserved because its benefits accrue disproportionately to certain constituencies. To overcome this, the set of regulations considered for elimination or modification should be large and broad enough for the total economic gains from their repeal to outweigh the protests of the narrow groups that benefit from preserving specific rules.

28. McLaughlin and Williams, “Consequences of Regulatory Accumulation,” quoting Jerry Brito, “Running for Cover: the BRAC Commission as a Model for Federal Spending Reform,” *Georgetown Journal of Law & Public Policy* 9, no. 1 (2011): 12.

29. *Ibid.*

4. THE SCRUB ACT AND CHARACTERISTICS OF SUCCESSFUL REFORM

In our study, Richard Williams and I identified 11 characteristics of successful reform, derived from lessons learned by studying the BRAC process, regulatory reform in other countries, and previous attempts at retrospective review in the United States. Some of these have already been discussed, but I list them below for the purposes of assessing the SCRUB Act with respect to each of these.

1. Before any specific regulations, agencies, or subject areas are broached, Congress must agree on the general principle that we need to eliminate or modify nonfunctional rules. Passage of the SCRUB Act or similar legislation that focuses on cleaning up regulatory accumulation would satisfy this characteristic.

2. The process should entail independent assessment of whether regulations are nonfunctional. The SCRUB Act creates a commission with the authority to hire analysts and experts necessary for such an assessment and to collect essential information for those purposes.

The SCRUB sets forth criteria for regulatory assessment that are not very different from how we define “nonfunctional” rules in our research. To be classified as functional in our paper, a rule must

1. address a current risk,
2. address a significant risk,
3. not result in ongoing costs (including unintended consequences) that more than offset the ongoing benefits of the rule, and
4. not interfere with or duplicate other rules.

While it is wise to build-in flexibility for the commission to devise new criteria in response to future lessons learned, it is equally important that any commission be required to publicly disclose its complete assessment criteria and take public comment on them.

3. The process should ensure there is no special treatment of any group or stakeholder. The act allows any entity to propose a rule or set of rules for consideration, which may help prevent special treatment.

4. The analysis must be broad enough to identify potentially duplicative regulations. Duplication and redundancy across agencies may be a large source of nonfunctional rules. For example, multiple agencies through different regulations may address food safety. In light of this source of nonfunctional rules, analysis that is focused on individual rules or the rules of a single agency may not capture factors (e.g., conflicts, duplication) that indicate certain rules are in fact nonfunctional.

5. The process should use a standard method of assessment that is difficult to subvert. The commission is required to specify a methodology for assessment. Doing so publicly and prior to beginning assessment will help achieve a transparent, objective end product.

6. Whatever the procedure for assessment, assessments of specific regulations or regulatory programs should focus on whether and how they lead to the outcomes desired. The SCRUB Act lists, as one of the criteria for assessment, “Whether the rule or set of rules is ineffective at achieving the rule or set’s purpose.” To meet our criteria, this phrase should mean achieving desired *outcomes*, as opposed to producing *outputs*. A rule may lead to an increase in an output, such as increased safety inspections, but that does not guarantee that there has been an increase in the outcome, safety.

7. Regulatory agencies should be recognized as another important stakeholder, with incentives to keep and increase regulation. The act calls for the commission to produce information independently of agencies on the costs of existing rules. Any new rules would have cost estimates produced by agencies. If agencies have incentive to increase regulation, they may avoid disclosing costs in order to be able to eliminate fewer of the targeted rules.

One means of reducing such avoidance may be to utilize both independent peer review and OIRA certification in assessing agency cost estimates.

8. The list of regulations targeted for elimination or modification should be long enough to overcome the concentrated benefits/dispersed costs problem. The act charges the commission to categorize rules identified for elimination or modification into one of two categories: rules for immediate repeal or amendment, and rules that go in the CUT-GO bank. Based on the number of regulations currently in place, a three-year period may not be sufficient for the commission to complete an assessment of all regulations, but it could certainly cover a substantial number of rules in that period. Whether the number of rules is enough to overcome the concentrated-benefits/dispersed-costs problem also depends on the how nonfunctional rules are distributed into the two categories. If only a relatively small number of rules are placed in the category of rules for immediate repeal or modification, there may be more resistance to allowing those changes to take place.

However, this will not affect the CUT-GO bank. Rules placed in this category circumvent the concentrated-benefits/dispersed-costs problem because they only require an agency to make a new rule in order to eliminate one or more of the nonfunctional rules in the CUT-GO bank.

9. Modifications to regulations should be limited. Only improvement from design standards to performance standards or other cost-reducing/innovation-inducing improvements should be suggested. The act includes provisions to promote modifications that are focused on cost reductions and generating innovation.

10. Congressional action—such as a joint resolution of disapproval—should be required in order to stop the recommendations, as opposed to a vote to enact or not enact. The act provides for congressional action on rules for immediate repeal and in certain cases involving the CUT-GO bank. This approach has several positive attributes. The rules classified for immediate repeal or modification would likely represent the low-hanging fruit—the obviously obsolete, duplicative, or ineffective rules. It makes sense to get rid of these as fast as possible. In addition, the CUT-GO bank would create the added benefit of forcing agencies to prioritize and economize in rulemaking.

11. The review process should repeat indefinitely. The act provides for a dissolution of the commission by a specific date. Given the likelihood that the commission cannot evaluate all regulations in a three-year period, it may be worthwhile to extend the life of the commission until all regulations are evaluated at least once. I would further recommend that the commission continue on an ongoing basis. The regulatory process will lead to regulatory accumulation again. This commission could balance out the tendency to accumulate regulations with a deliberate and streamlined process for eliminating nonfunctional regulations if and when they appear.

CONCLUSIONS

Regulatory accumulation in the United States, with its adverse impact on economic growth, is now a widely recognized problem. The problem has not been meaningfully addressed despite the efforts of several administrations.

One reason it has been hard to address regulatory accumulation is the difficulty of identifying nonfunctional rules—rules that are obsolete, unnecessary, duplicative, or otherwise undesirable. An independent group or commission seems required to successfully identify nonfunctional rules.

Another obstacle to addressing regulatory accumulation is the difficulty of cutting nonfunctional regulations, even if a list of nonfunctional regulations existed. The BRAC process overcame similar difficulties by requiring Congress to accept the recommendations of the BRAC Commission for *all* bases on the commission's list, unless Congress passed a joint resolution of disapproval. Similarly, a regulatory cleanup of accumulated regulations should require action on a long and broad list of nonfunctional regulations, with a joint resolution of disapproval required to stop action on the commission's recommendations.

The SCRUB Act has several characteristics that make it more likely to succeed where previous attempts have failed. First, it appoints an independent commission to identify nonfunctional rules. Second, it requires the commission to categorize all nonfunctional rules into one of two groups: those to be considered for immediate

repeal or amendment, and those to be considered for CUT-GO procedures. If enough rules are placed in the first category, the concentrated-benefits/dispersed-costs problem may be overcome. Third, the act requires that the commission establish a methodology prior to beginning the assessment of rules, thereby minimizing opportunities for the assessment to be subverted by special interests. Fourth, the act establishes criteria that the commission would use to identify nonfunctional rules, and these criteria are primarily based on fundamental problem-solving and economic thinking.

ABOUT THE AUTHOR

Patrick A. McLaughlin is a senior research fellow at the Mercatus Center at George Mason University. His research primarily focuses on regulations and the regulatory process, and he is the creator and cofounder of RegData. His work has been featured in numerous scholarly journals, including *American Law and Economics Review*, *Administrative Law Review*, *Regulation & Governance*, *Risk Analysis*, and *Public Choice*. McLaughlin received his PhD in economics from Clemson University.

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House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law
 Testimony of Patrick McLaughlin
 Hearing on "The Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014"
 February 11, 2014

RESEARCH FOR INCLUSION IN THE HEARING RECORD

Hansen, Megan E., Randy T. Simmons, Ryan M. Yonk, and Ken J. Sim. "Logan City's Adventures in Micro-Hydropower: How Federal Regulations Discourage Renewable Energy Development." George Mason University Mercatus Center Working Paper 13-24 (2013). <http://mercatus.org/publication/logan-city-s-adventures-micro-hydropower-how-federal-regulations-discourage-renewable>.

McLaughlin, Patrick and Richard Williams. "The Consequences of Regulatory Accumulation and Proposed Solution, George Mason University Mercatus Center Working Paper (2014), released on February 11, 2014. <http://mercatus.org/>.

Mitchell, Matthew. "The pathology of privilege: the economic consequences of government favoritism." Mercatus Research. 2012. <http://mercatus.org/publication/pathology-privilege-economic-consequences-government-favoritism>.

Mr. BACHUS. Thank you. Your opening statement was exactly 5 minutes.

Mr. McLAUGHLIN. I had a little bit more.

Mr. BACHUS. I do not think I have ever had a 5-minute opening statement right to the second.

Mr. Batkins? And you do not have to be right at 5 minutes.

Mr. BATKINS. I probably will not replicate that.

Mr. BACHUS. No, no. I am not expecting to see that again this year.

**TESTIMONY OF SAM BATKINS, DIRECTOR OF
REGULATORY POLICY, AMERICAN ACTION FORUM**

Mr. BATKINS. Thank you, Mr. Chairman, Ranking Member Johnson, and Members of the Subcommittee. Thank you for the opportunity to testify today and examine regulatory reform opportunities.

I would like to start by highlighting the successes and struggles of President Obama's current attempt at regulatory reform and the potential benefits of codifying retrospective review.

First, when President Obama continued the strong tradition of ensuring that regulatory costs justify benefits, he called for a periodic review of existing significant regulations. President Obama and then-OIRA Administrator Cass Sunstein made a very public push to highlight some of the redundant and outmoded rules in our regulatory system, including the fabled "Spilled Milk" regulation. The Administration has release plans with hundreds of possible retrospective reviews, but upon closer scrutiny, it is clear that many of these measures are not regulatory look-backs and they do not streamline, expand, or repeal existing regulations.

For example, the Department of Energy lists 19 rulemakings in its latest retrospective report. However, six of these are new energy efficiency standards that do not appear to revisit existing rules, but instead impose significant new costs.

Likewise, Health and Human Services included at least nine Affordable Care Act regulations in its latest report. These measures did not look back at existing regulations or attempt to repeal certain regulatory provisions. Instead, they implemented the recent health care law.

There have been successes in regulatory reform. The Department of Transportation plans to save the trucking industry \$1.7 billion annually and cut the agency's paperwork budget by 15 percent.

Likewise, HHS finalized a rule to reduce procedural hurdles for hospitals and health care providers, saving approximately \$900 million annually.

However, if we examine all retrospective reports and compare new rules that impose costs and compliance time to rules that actually look back to streamline or eliminate costs, the ratio is 3.7 to 1 in favor of higher costs. For paperwork, the ratio is 6.7 to 1. In other words, retrospective reports contain more new rules with higher costs than regulatory look-backs with lower costs.

Regulatory reform through executive order alone has not produced the desired results. During the past 10 years, the Nation's cumulative paperwork burden has increased 28 percent, or 2.2 billion hours. In the equivalent amount of time, it would take 1.1 mil-

lion new employees working 2,000 hours a year to complete these new requirements.

Codifying retrospective review would submit more than 30 years of informal review into law. I believe legislation that addresses the Nation's cumulative regulatory burden would have a variety of benefits.

The Government Accountability Office, as we have noted here, has highlighted duplication in its annual report for the past few years. GAO found 17 areas of duplication, including veterans employment and renewable energy. We replicated GAO's methodology for paperwork requirements and found 990 duplicative forms and more than 642 million paperwork burden hours. The regulatory cut-go provision in the proposed legislation would address this duplication by allowing agencies to choose from a range of past rules eligible for reform. To date, the U.S. has never had a formal system to address regulatory duplication, but if the commission is successful, it could identify hundreds of past rules in need of reform.

To some extent, the U.S. is behind the curve on regulatory reform. The United Kingdom has a system to remove two regulations for every new rule. Closer to home, Indiana has codified retrospective review for regulations 3 years after implementation. The proposed legislation actually provides agencies with some deal of flexibility compared to the British one-in/two-out system.

Perhaps most importantly, the proposed bill would extend some level of OIRA review to independent agencies, the same regulatory bodies that govern our telecommunications and financial system. During the past 2 years, financial regulators have produced more than 113 regulations with quantifiable burdens with little executive oversight. As the Administrative Conference of the United States has noted, it is past time for heightened regulatory scrutiny of independent agencies.

In conclusion, I would like to emphasize that retrospective review dates back to the Carter administration and is by no means a radical step. It is simply implementing best practices.

Thank you for your time, and I look forward to answering questions.

[The prepared statement of Mr. Batkins follows:]

H.R. ___, The Searching for and Cutting Regulations that are Unnecessarily
Burdensome Act of 2014

United States House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Sam Batkins*
Director of Regulatory Policy
American Action Forum

February 11, 2014

*The views expressed here are my own and not those of the American Action Forum.

Chairman Bachus, Ranking Member Johnson, and Members of the Subcommittee, thank you for the opportunity to appear today. In this testimony, I wish to make three basic points:

- Regulatory reform at the executive level has a history that stretches back to President Nixon, but leaving regulatory restraint to one branch of government has failed to slow the pace of new rules;
- Executive Order 13,563, issued by President Obama in 2011, continued the tradition of ensuring new regulatory costs justify benefits, but aside from a handful of retrospective reviews, it has not fundamentally addressed the cumulative impact of regulation, and
- The proposed legislation provides a significant set of improvements to the regulatory process while providing flexibility to agencies so that they can continue to protect health and safety.

Let me provide additional detail on each in turn.

I. Successes and Failures of Previous Regulatory Reform

After enactment of the Clean Air Act and National Environmental Policy Act, President Nixon established the National Industrial Pollution Control Council (NIPCC) to focus on the “cost of increasingly stringent pollution control regulations.”¹ In addition to the Nixon Administration’s Quality of Life Committee, the NIPCC focused on new regulations that could potentially impose substantial costs. These were the first formal attempts to examine the impact of new regulations.

President Jimmy Carter then issued Executive Order 12,044, attempting to ensure “compliance costs, paperwork and other burdens on the public are minimized.”² He established a form of retrospective review, asking agencies to “periodically review their existing regulations to determine whether they are achieving the policy goals of [Executive Order 12,044].”³ In addition, the Carter Administration established the “Regulatory Council,” an interagency group designed to weed out regulatory duplication. Finally, President Carter cemented his regulatory legacy when he signed the Paperwork Reduction Act, creating a way for the administration to track cumulative paperwork burdens and codifying the Office of Information and Regulatory Affairs (OIRA).

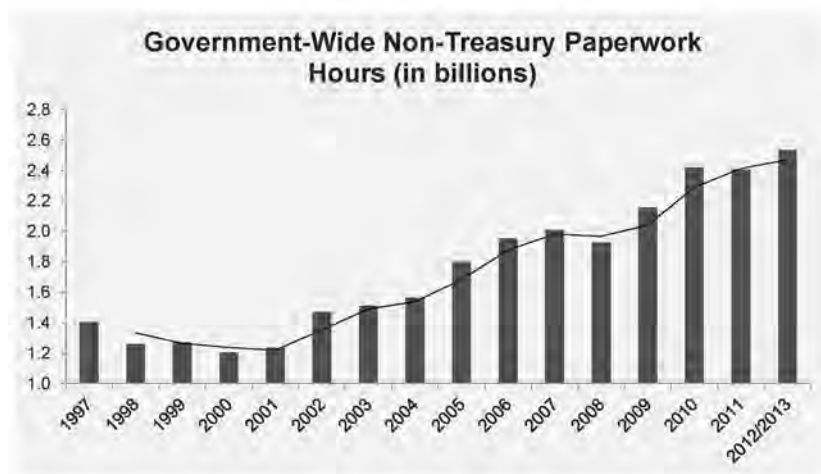
These are important legacies, but over time, the nation’s cumulative regulatory burden has steadily increased and retrospective review has withered. Few deny that the federal government has a role to play in protecting the nation’s health and safety, but it has the equally important task of reducing regulatory duplication and promoting economic growth.

As the chart below reveals, non-tax related paperwork continues to climb, placing burdens on American consumers and businesses. This data removes the drastic fluctuations in Treasury paperwork and displays that the aggregate level of compliance time with federal regulation continues to increase.

¹ Joe Greene Conley II, *Environmentalism Contained: A History of Corporate Responses to New Environmentalism* 164 (Nov. 2006), available at http://www.thecre.com/pdf/20090423_conley_dissertation.pdf.

² Exec. Order 12,044, available at <http://www.presidency.ucsb.edu/ws/?pid=30539>.

³ *Id.* at 2.



Nations around the globe, and even local governments, have formalized procedures for addressing the cumulative stock of regulations. Moving forward with reform, it is important for the U.S. to take steps to address regulation through a fair and transparent process.

II. Successes and Struggles of Executive Order 13,563

When President Obama issued Executive Order 13,563, he embraced the ideal that the nation's regulatory system should "protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."⁴ There have been successful strides under Order 13,563 to remove redundant regulations and cut costs, but they are often in fits and starts, without a true "culture of retrospective review."⁵

To illustrate, in 2013 the federal government added 159.9 million new paperwork hours, according to OIRA's daily tally of aggregate paperwork.⁶ There have been notable rulemakings that examined past regulations and reduced costs while still protecting public health. For example, the Department of Transportation (DOT) proposed to drastically reduce the amount of paperwork truck drivers file under "Driver-Vehicle Inspection Reports."⁷ By only requiring reports after an incident, as opposed to a routine trip, DOT plans to save the industry more than \$1.7 billion annually and reduce 46.7 million paperwork burden hours, or roughly 15 percent of DOT's total burden.

⁴ Exec. Order 13,563, available at <https://www.federalregister.gov/executive-order/13563>.

⁵ OMB Memorandum M-11-19, available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-19.pdf>.

⁶ Inventory of Currently Approved Information Collections, available at <http://www.reginfo.gov/public/do/PRAReport?operation=11>.

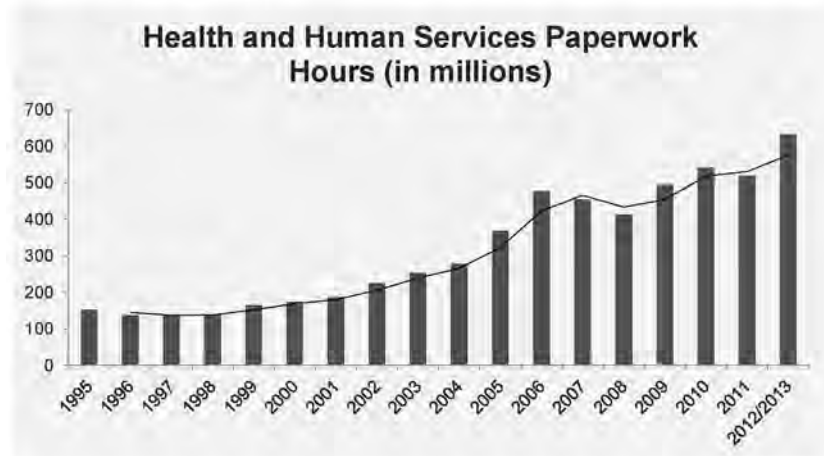
⁷ 78 Fed. Reg. 48,125 (August 7, 2013).

However, there are only a handful of these notable rules, and they are dwarfed by the 3,600 other rules regulators issue annually. Examining the most recent retrospective review reports from the administration reveals that many agencies treat these reports as just another Unified Agenda. Many of the rules fail to look back at past regulatory programs. Instead, they implement parts of the Affordable Care Act (ACA) or other recent legislation. It is no surprise the administration is implementing the ACA, but it should not label these new regulations as “retrospective.”

The Department of Energy (DOE) is another culprit in this exercise. Its most recent retrospective review update contained 19 “retrospective” rulemakings; six of these are new energy efficiency measures that increase costs and impose more paperwork. They do not examine previous regulations, and they do not address redundancy. Combined, DOE’s retrospective report adds more than \$17.7 billion in cumulative costs and 60,200 paperwork burden hours. The agency failed to quantify a single measure that would reduce costs or paperwork.

This story is essentially identical for other agencies. Retrospective review has produced a few notable rules that save businesses and consumers time and money, but on net, the result is higher burdens. HHS has a difficult task implementing the ACA, but its report contains numerous regulations that add costs. There are at least nine ACA regulations in the agency’s recent retrospective report. Despite three notable deregulatory measures from HHS, its report imposes an additional \$6.1 billion in costs and more than 5.8 million burden hours.

The chart below displays the steady growth of HHS paperwork since 1995. Through three administrations, each with similar executive orders on regulatory reform, none has been able to slow the steady rise of new paperwork.



Examining every quantified rulemaking in the retrospective reports, the number of rules increasing costs out-number cost cutting measures by 3.7 to 1. For paperwork, that ratio is 6.7:1. It is clear that regulatory reform through executive order struggles to produce significant results. Fundamental reform that thoroughly examines the cumulative stock of regulations while providing flexibility to agencies is vital to ensuring continued economic success.

III. Benefits of Codifying Retrospective Review

The most obvious benefit of codifying retrospective review and establishing a framework for reducing duplication is permanency. Executive orders are, of course, temporary and could easily whither with new administrations.

In addition, establishing a judicial review component would add the necessary legal teeth, ensuring that agency actions are reviewable by another branch. Executive Order 13,563 makes clear that agencies are immune from judicial review under the directive: “This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States....”⁸ One need only look at the hundreds of annual violations of the Paperwork Reduction Act to conclude that a judicial review component would be an important check on agency behavior.

There are three areas of reform that the proposed legislation addresses: duplication, universality, and regulatory efficiency. Let me provide additional detail on each in turn.

Duplication

All sides in the political and policy debates acknowledge some level of duplication in the federal government. For example, legislators recently established a bipartisan task force to “conduct a comprehensive review of federal regulations and reporting requirements affecting colleges and universities.”⁹ However, this is not a government-wide review and it is not permanent.

From an international perspective, the U.S. falls below the standard when addressing cumulative regulatory burdens. The Organization for Economic Co-Operation and Development (OECD) recommends that all nations “conduct systematic programme reviews of the stock of significant regulation against clearly defined policy goals, including consideration of costs and benefits, to ensure that regulations remain up to date, cost justified, cost effective and consistent, and deliver the intended policy objectives.”¹⁰ The proposed legislation would establish a systematic review with “clearly defined policy goals,” which has been lacking under the current executive order framework.

⁸ Exec. Order 13,563, available at <https://www.federalregister.gov/executive-order/13563>.

⁹ “Senate Education Committee Members Announce Task Force to Review Higher Ed Regulations and Reporting Requirements,” available at http://www.burr.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=6cbb9f9-0b61-e546-141a-c7bffc57c70.

¹⁰ OECD, “Recommendation of the Council on Regulatory Policy and Governance,” available at <http://www.oecd.org/gov/regulatory-policy/49990817.pdf>.

Even the Government Accountability Office (GAO) has made a specific set of recommendations to address duplication. Last spring, GAO released its annual report on federal “Fragmentation, Overlap, and Duplication.”¹¹ The report found 17 areas of duplication, including renewable energy and veterans’ employment, and based on these findings, researchers at the American Action Forum replicated GAO’s methodology for overlap in paperwork requirements. The spending equation of government duplication totals approximately \$200 billion, according to Senator Tom Coburn, but regulatory duplication also has a price.¹² Based on the 17 areas of duplication, we found 642 million paperwork hours, \$46 billion in costs, and 990 forms of federal overlap. For example, ten different agencies are involved in renewable energy programs and produce 96 related forms.¹³

This duplication has real implications for Americans interacting with government every day. In a well-documented failure, there are more than 400,000 veterans waiting on benefit claims. These wait times are not only a result of the surge in veterans applying for benefits but also the maze of paperwork in the current system. Analysts at the American Action Forum found more than 600 different forms relating to veterans’ claims, imposing millions of paperwork burden hours.¹⁴ Some veterans undergo briefings on the application process, with the expectation that benefits will not arrive promptly.

There must be a systematic program in place to address this duplication, and based on the data, the executive order approach has not delivered on its promised reforms. Sorting through more than 9,100 paperwork requirements and 174,000 pages in the Code of Federal Regulations (CFR), including a 21 percent increase in the CFR during the past ten years, is indeed an ambitious process. Appendix 1 provides just a two-year snapshot of the CFR regulatory activity.

From Appendix 1, it is clear that certain titles of the CFR receive more activity than other titles. Excluding routine airworthiness directives, “Banking” (Title 12) and the “Environment” (Title 40) received the highest number of regulations. For total costs, “Environment” led all titles, with \$16.8 billion, while “Public Health” (Title 42) imposed more than 34.6 million new paperwork burden hours. Of course, beyond these topline figures, the proposed Commission will have to determine which regulatory programs to amend, cut, or remain in place.

Title II of the legislation, “Regulatory Cut-Go,” specifically addresses the accumulation of regulation. By ensuring a regulatory neutral approach to costs, the cut-go procedure could stem the tide of regulatory growth, while still allowing agencies to fulfill their statutory objectives.

The idea of cut-go is similar to the United Kingdom’s One-in, One-Out (OIOO) system for regulation, which has now been expanded to One-In, Two-Out (OITO). The cut-go idea is also similar to a reform I proposed last year, a paperwork budget that would only apply to new

¹¹ Government Accountability Office, “2013 Annual Report: Actions Needed to Reduce Fragmentation, Overlap, and Duplication and Achieve Other Financial Benefits,” available at <http://www.gao.gov/assets/660/653604.pdf>.

¹² Senator Tom Coburn, Letter to Deputy Director Jeffrey Zients, available at http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=feba26e1-7102-4a0f-bb55-a91e7477d98f.

¹³ American Action Forum, “Weeding Out Regulatory Duplication,” available at <http://americanactionforum.org/topic/weeding-out-regulatory-duplication>.

¹⁴ American Action Forum, “Red Tape Challenges to America’s Veterans,” available at <http://americanactionforum.org/topic/red-tape-challenges-america%E2%80%99s-veterans>.

collections of information.¹⁵ The cut-go plan improves on both of these reforms because it is more comprehensive than a paperwork budget, and it provides agencies more flexibility than the OITO system.

Universality

Fundamental regulatory reform must also incorporate independent agencies to be successful. Since 1981, OIRA has formally reviewed significant actions from cabinet departments, but independent agencies are largely exempt from regulatory review.

Although these agencies are subject to the Congressional Review Act, Congress has never rescinded an independent agency action. In addition, the Paperwork Reduction Act merely tracks their paperwork requirements, and has not proven to be an effective check on independent agency action. For example, aggregate paperwork burdens at the Securities and Exchange Commission, the Federal Communications Commission, and the Federal Trade Commission have increased 63 percent during the last ten years.

Furthermore, since 2012, Titles 12 and 17 (“Banking” and “Commodities and Securities”) of the CFR have produced 113 final rules. Combined, they will add \$12.7 billion in costs, all with little oversight. Comprehensive reform must address independent agency actions in a way that analyzes the costs and benefits of new regulation, and addresses the cumulative impact of past rules.

Regulatory Efficiency

The hallmarks of retrospective review should be more than just cutting costs and burden hours. It is also important to study what regulations have worked well in the past and what rules could be improved. Using successful regulatory programs as a model for future regulation could reduce the likelihood that a new rule imposes unnecessary costs or leads to unintended consequences.

If the proposed Commission is successful, it will identify a range of regulatory programs, and more than likely, a few rules that are duplicative and need to be amended. As then-Administrator Cass Sunstein noted, retrospective review should also focus on “modernizing rules” and consider “the combined effect of their regulations.”¹⁶

The proposed legislation has the advantage of providing flexibility to agencies. Instead of agencies expending staff time and resources conducting a retrospective review of their entire regulatory slate, the proposed Commission will suggest several rules for action. This approach is more flexible than the United Kingdom’s OITO program, which forces regulators to remove two regulations for every new rule. The proposed Commission would handle the process and resources of retrospective review, while agencies would continue to implement statutory directives, subject to Section 201 of the proposed legislation.

¹⁵ American Action Forum, “Can a Paperwork Budget Trim Red Tape,” *available at* <http://americanactionforum.org/research/can-a-regulatory-budget-trim-red-tape>.

¹⁶ OMB Memorandum M-11-10, *available at* <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf>.

In sum, the proposed legislation addresses cumulative regulatory burdens without constraining the current work of agencies. The Commission would handle the time, resources, and method of retrospective review, and agencies would have the freedom to choose from a range of regulations in the cut-go pool.

IV. Conclusion

Regulatory reform has always been a bipartisan exercise, and so have the executive orders. The Paperwork Reduction Act passed with only 13 “no” votes in the House of Representatives; the Unfunded Mandates Reform Act received 28 “no” votes. Recently, Indiana passed a bill codifying retrospective review for all rules three years after implementation. The legislation won unanimous support in Indiana’s Senate.

From Indiana, to the United Kingdom, to current Executive Order 13,563, there is widespread support for the principle of retrospective regulatory review. Given the historical level of regulatory growth and lack of true “look backs,” the current executive order approach has not sufficiently enshrined a “culture of retrospective review.” A flexible approach that addresses the cumulative stock of rules would usher the regulatory state into a new era and reduce uncertainty from one administration to the next.

Appendix 1

Regulation by Industry: 2012-2013

<u>CFR Title-Industry</u>	<u>Regulations</u>	<u>Cost (in millions)</u>	<u>Hours</u>
7-Agriculture	10	\$3,530	32,610,034
8-Immigration	4	\$801	976,669
9-Animals	6	\$49	27,270
10-Energy	11	\$7,659	174,912
12-Banking	61	\$307	11,059,631
13-Business Assistance	2	\$0.4	929
14-Aeronautics	373	\$3,389	7,859
15-Commerce, Trade	3	\$0	20,971
16-Commercial Practices	7	\$69	755,158
17-Commodities, Securities	52	\$12,451	36,823,011
18-Conservation	21	\$118	2,855,093
19-Customs Duties	4	\$0	51,200

20-Employees' Benefits	5	\$350	16,780
21-Food and Drugs	6	\$722	1,378,250
22-Foreign Relations	3	\$9	72,920
23-Highways	2	\$1	25,436
24-Housing	8	\$22	1,925,983
25-Native Americans	2	\$0	108,975
26-Internal Revenue	17	\$0	10,786,022
27-ATF	2	\$12.95	446,638
28-Judicial Administration	1	\$0	0
29-Labor	14	\$4,883	16,015,817
30-Mineral Resources	4	\$205	704,425
31-Treasury	3	\$0.03	88,013
32-National Defense	1	\$0	1,775
33-Navigable Waters	2	\$284	99,678
34-Education	6	-\$162	-3,572,970
37-Patents, Copyright	4	\$1,049	1,363,734
38-Pensions, Bonuses	1	\$0	32,689
40-Environment	45	\$16,847	3,044,352
41-Public Contracts	2	\$1,865	13,362,497
42-Public Health	36	\$10,132	34,605,668
45-Public Welfare	22	\$10,079	8,432,908
46-Shipping	5	\$233	56,098
47-Telecommunication	40	\$209	33,743,315
48-Federal Acquisition	2	\$0	122,807
49-Transportation	26	-\$273	2,813,500
50-Wildlife and Fisheries	2	\$0.23	47,481
Multiple Titles	13	\$158,090	3,177,055

Mr. BACHUS. Thank you.
Professor Levin, you are recognized.

TESTIMONY OF RONALD M. LEVIN, PROFESSOR, WILLIAM R. ORTHWEIN DISTINGUISHED PROFESSOR OF LAW, WASHINGTON UNIVERSITY SCHOOL OF LAW

Mr. LEVIN. Yes, Mr. Chairman. I apologize for arriving a few moments late.

Mr. BACHUS. You actually arrived fine.

Mr. LEVIN. Okay, that is good.

Chairman Bachus, Ranking Member Johnson, and Members of the Subcommittee, thank you for inviting me to testify on retrospective review today. I did testify on general principles in this area in 2012 before you. It is a privilege to return to the subject in the context of a specific bill.

As we all know, the regulatory system already has a number of methods of inducing agencies to do more look-back review, and they include some statutes, presidential initiatives like the one President Obama pursued, congressional oversight, and the ability of anyone to file a petition for revision or repeal of a regulation and get an answer from the agency and potentially get judicial review.

The question is whether we need to supplement these systems with a new mechanism.

I think the case for doing that has been overstated. We should not equate the growth of regulations with the growth of unnecessary regulations. Many of them are directly contemplated by legislation and confer enormous benefits on society, such as safe skies, clean air, safe workplaces, and a sound banking system. It is often the absence of regulations that causes harm to our economy and society.

But we can agree that some rules are obsolete and ineffective or cause unwanted side effects, and I would not rule out the possibility that some new structure could be helpful. But the one contemplated by the SCRUB Act is not it, in my judgment.

In the first place, the commission that it would establish does not comply with the Appointments Clause of the Constitution. Most of its members would be appointed by House and Senate leaders of the majority and minority parties. A group like that can recommend, but it cannot itself exercise significant authority under the laws of the United States. The Supreme Court established this in *Buckley* against *Valeo* in 1976. I know Representative Johnson asked me to elaborate, but really, the law is clear and simple, and unfortunately, this bill is on the wrong side of it.

But let us assume that you fix that defect and look at the bill's policy implications. The commission would still not be a credible authority because most of its members would not need to be experts in anything, and they could not possibly be experts in all the areas that they would have power to affect and that power would be breathtaking. They could order the elimination or amendment of any rule of any agency that they consider unnecessarily burdensome, and they could use any methodology they want. Even soothsayers or astrological charts would do under the bill. And nobody could prevent their decisions from going into effect, not the courts presumably, not the agency. OIRA and the White House would

have no review. And even if Congress passes a disapproval resolution with the House, the Senate agreeing, with the President signing, the commission's decisions would still be merely postponed, not canceled. And if all that is not far-fetched enough, a minority of the commission, outvoted, could wield these same powers. In Justice Cardozo's phrase, this is delegation run riot.

Then the bill provides for a cut-go process in which an agency cannot adopt a new rule without offsetting its cost with a rule from the commission's list. The biggest problem with that is that the commission's list itself would not be reliable, but also this process would complicate the process of rulemaking no matter how important or urgent the rule may be.

And finally, the bill provides that every new rule, no matter how trivial, would have to be accompanied by a plan to reexamine it a decade hence. That is way overbroad for most rules. And even for important ones, it is premature to make a plan in 2014 for how you are going to reexamine it in 2024 when you cannot foresee what the situation a decade from now would be.

So I really think that the Subcommittee needs to take a pause in this area. The best thing it could do would be to wait for the forthcoming recommendations of the Administrative Conference, which is now launching a study, of retrospective review, to be finished by the end of the year. See what proposals they make. But if the Subcommittee does decide to go forward with this bill, the bill will need a thorough and fundamental scrubbing.

That concludes my statement, and I will be happy to take your questions.

[The prepared statement of Mr. Levin follows:]

Testimony of Ronald M. Levin
William R. Orthwein Distinguished Professor of Law
Washington University in St. Louis

Before the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Hearing on H.R. ____, the “Searching for and Cutting Regulations that are
Unnecessarily Burdensome Act of 2014.”

February 11, 2014

SUMMARY

At present, agencies conduct retrospective review of existing rules under the influence of a variety of external factors that encourage and guide such review. These mechanisms include legislation, presidential initiatives, congressional oversight, and rulemaking petitions filed by private persons. It is an open question whether a new legislative structure is needed as a supplement to these factors.

Even if so, however, the Retrospective Regulatory Review Commission envisioned by the proposed “SCRUB Act” suffers from serious deficiencies. Its structure would violate the Appointments Clause of the Constitution, because it has been settled law since *Buckley v. Valeo*, 424 U.S. 1 (1976), that persons appointed by legislative leaders cannot exercise significant authority under the laws of the United States.

Even if that deficiency were repaired, the Commission would lack the expertise and political accountability to make such major decisions as the elimination or amendment of agency regulations. Moreover, the provisions defining the Commission’s powers would pose major risks of arbitrary decisionmaking. Essentially, the Commission would have authority to order elimination or amendment of *any* agency rule that it considers unnecessarily burdensome, and no external body could provide a check on its decisions. Under some circumstances a *minority* of the Commission could wield the same powers.

The Act would also establish a “cut-go” process: in order to issue a new rule, an agency would be required to offset its costs by rescinding or amending an existing rule as listed in the Commission’s report (if any such listed rules remained). This procedure would unduly complicate rulemaking proceedings, and its premise that a quantitative value must be assigned to the costs of *every* new rule is impractical.

Finally, the Act would require that an agency that issues any new rule must accompany it with a plan by which the rule will be reviewed a decade later. This requirement is enormously overbroad. Even if it were limited to major rules only, the preparation of such plans at the rule issuance stage would be premature.

For these reasons, the subcommittee should fundamentally reappraise its plans to revamp the process of retrospective review of agency rules. It should consider awaiting the Administrative Conference’s forthcoming detailed study of that topic before taking further action.

**Testimony of Ronald M. Levin
William R. Orthwein Distinguished Professor of Law
Washington University in St. Louis**

**Before the
U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform, Commercial and Antitrust Law**

Hearing on H.R. ____, the “Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014”

February 11, 2014

Chairman Bachus, Ranking Member Johnson, and members of the Subcommittee, it is a privilege for me to be able to appear before you today to testify regarding a discussion draft of the proposed “Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014.” As some of you may recall, I also testified before the subcommittee on July 12, 2012, on the subject of retrospective review of agency rules.¹ That hearing dealt with the subject on a general level. I appreciate your invitation to return in order to discuss a specific legislative proposal on the same subject.

By way of brief introduction, I am the William R. Orthwein Distinguished Professor of Law at Washington University in St. Louis. I have taught and written about administrative law for more than thirty years. I am the coauthor of a casebook on administrative law and have also written many law review articles in that field. In addition, I am a past Chair and longtime active member of the Section of Administrative Law and Regulatory Practice of the American Bar Association (ABA); and I currently serve as a public member of the Administrative Conference of the United States (ACUS) and chair of its Judicial Review Committee. However, I am testifying today solely in my individual capacity and not on behalf of any organization.

I. Background

As I testified in 2012, I believe a healthy regulatory system must include a capacity to examine existing rules to consider, with the benefit of hindsight, whether they are out of date or are not working as well as originally contemplated. To assess the possible need for legislation in this area, we should begin with an understanding of existing retrospective review (“lookback”)

¹*Clearing the Way for Jobs and Growth: Retrospective Review to Reduce Red Tape and Regulations: Hearing Before the Subcomm. on Courts, Commercial, and Administrative Law of the H. Comm. on the Judiciary*, 112th Cong. (2012) (testimony of Ronald M. Levin) (hereinafter *2012 Retrospective Review Testimony*), <http://judiciary.house.gov/index.cfm/hearings?ID=37A1AEB4-AFA1-6465-6E4E-0529E909296F>.

processes and procedures. I discussed the history and structure of programs in this area in my 2012 testimony² and will recapitulate that discussion only briefly here.

Retrospective review has long been prescribed by some legislation, such as the Regulatory Flexibility Act, and by a series of executive orders and other initiatives announced by successive presidential administrations. Beginning in 2011, the Obama administration has made a particularly concerted effort to encourage agencies to engage in retrospective review. In EO 13563,³ the President called for all executive agencies to submit plans for retrospective review of their “significant” regulations to the Office of Information and Regulatory Affairs (OIRA). A subsequent directive, Executive Order 13579, urged *independent* agencies to comply (voluntarily) with a similar process.⁴ Finally, Executive Order 13610 expanded on the prior orders by directing executive agencies to take “further steps . . . consistent with law, agency resources, and regulatory priorities, to promote public participation in retrospective review, to modernize our regulatory system, and to institutionalize regular assessment of significant regulations.”⁵ The intent of this order is to induce agencies to devote regular attention to retrospective review on a continuing basis.

The administration has claimed considerable success as a result of this initiative.⁶ A recent draft article by Professor Cass Sunstein, who was OIRA Administrator during this period, makes this case in some detail.⁷

Although I believe that an agency that administers a program will normally be in the best position to judge whether and how its rules should be modified or rescinded, there is force to the idea that one cannot count on agencies to make optimal choices about lookback on their own initiative. The forces of habit and inertia, not to mention competing priorities, often make it hard for agencies to look beyond their established methods of doing business in the absence of pressure from outside. It is relevant to remember, however, that external pressure does exist. Initiatives from the executive branch, such as the program I just mentioned, are one source of such influence. Congressional oversight can also serve to press an agency to reconsider policies that aren’t working.

In addition, a sometimes overlooked, but still important, component of the system of retrospective review is the petition process. Anyone who believes that an agency rule should be changed can file a petition for rulemaking pursuant to § 553(e) of the Administrative Procedure

²*Id.* at 2-3.

³76 Fed. Reg. 3821 (Jan. 18, 2011).

⁴76 Fed. Reg. 41587 (July 11, 2011).

⁵77 Fed. Reg. 28,469 (May 10, 2012).

⁶COUNCIL OF ECONOMIC ADVISORS, SMARTER REGULATIONS THROUGH RETROSPECTIVE REVIEW 1 (2012), available at http://www.whitehouse.gov/sites/default/files/lookback_report_rev_final.pdf.

⁷Cass R. Sunstein, *The Regulatory Lookback*, forthcoming in B.U. L. REV. (preliminary draft available at <http://ssrn.com/abstract=2360277>) (draft at 12-16).

Act (APA). If the agency does not accept the suggestion, it must give reasons, and a disappointed petitioner can appeal a denial to the courts. In this fashion, the petition process puts the adversary process of our legal system to work as a force for reexamination of existing rules. Not every petition will be successful, but under some circumstances this means of pressing an agency to consider changes in its rules can be quite effective.

Against this background, we can ask whether these mechanisms, considered as a whole, should be supplemented by further adjustments. In this regard it is important to be aware that the Administrative Conference has recently announced a plan to conduct a study of retrospective review of agency rules and make recommendations.⁸ Its goals are to examine agency approaches to retrospective review, identify characteristics of successful reviews, and suggest measures to enhance the process. ACUS intends to complete this project, including issuance of recommendations, by the end of 2014. Much could be said in favor of the subcommittee's awaiting the results of this inquiry before it moves forward with a legislative initiative of its own.⁹

Nevertheless, it is certainly possible that a new structure for retrospective review of rules might be helpful, as a complement to the mechanisms I summarized above. In the remainder of this statement, I will provide a critical evaluation of whether the discussion draft before us today would make such a contribution.

II. Overview of the SCRUB Act

The bill would be known as the "Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014," or SCRUB Act. I will briefly mention the central features here, with further details in the body of my analysis.

Title I of the bill would establish a Retrospective Regulatory Review Commission (RRRC) to propose modification or elimination of existing regulations. The chair would be chosen by the President, and eight members would be chosen by majority and minority leaders of the House and the Senate. The RRRC's mandate would be to identify for elimination or amendment "unnecessarily burdensome" regulations, and the bill contains a non-exclusive list of factors that the Commission could take into account in making this determination. The Commission would formulate a list of rules (or sets of rules) that would be slated for elimination or amendment, either immediately or over time through a "cut-go" process (explained below). The list would be forwarded to Congress, which would have 45 days to consider passing a joint

⁸Request for Proposals: Retrospective Reviews of Agency Rules (Jan. 10, 2014), <http://www.acus.gov/rfp/retrospective-review-project-rfp>.

⁹Professor Coglianese has also suggested that the issuance of evaluation guidelines by OIRA could improve agencies' performance in conducting retrospective review. Cary Coglianese, *Moving Forward with Regulatory Lookback*, 30 YALE J. ON REG. ONLINE 57, 61-62 (2013).

resolution disapproving the list through a fast-track procedure. If the resolution did not pass, the list would be forwarded to the affected agencies for prompt action. If the resolution did pass, the rules on the list would nevertheless become subject to cut-go.

Under Title II, in the cut-go process, an agency would be unable to promulgate any new regulation unless it also offset its cost by eliminating or amending a rule from the Commission's report, until it has taken action on all of those rules. The agency could also make the "cuts" in advance as credits toward future regulations. An agency would be able to bypass the cut-go tradeoff only if this action were affirmatively authorized by enactment of a joint congressional resolution.

In addition, Title III of the bill provides that agencies must, in promulgating any new rule, include a plan for review of this rule within ten years. In the case of a major rule, this decennial review would have to follow the same evaluation criteria as the RRRC would use in its reviews. The Title III obligations would be judicially reviewable under the APA.

III. Constitutionality

A threshold problem is that Title I is plainly unconstitutional, because it vests sweeping authority in individuals appointed by legislative leaders. The Court faced a very similar issue in *Buckley v. Valeo*.¹⁰ As provided in the Federal Election Campaign Act prior to that case, four members of the Federal Election Commission were appointed by the Speaker of the House and the President Pro Tempore of the Senate based on the recommendations of the majority and minority leaders in each chamber. The Court held that this structure violated the Appointments Clause of the Constitution (Article II, § 2, cl. 2). According to that constitutional provision, all "Officers of the United States" must be appointed by the President with senatorial confirmation, except that "inferior officers" may be appointed by the President, the head of a department, or a court of law. The appointments of the four legislatively appointed FEC members were invalid because they fit none of these categories. Generalizing, the *Buckley* opinion stated that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause]."¹¹ I know of no subsequent Supreme Court case that casts doubt on the Court's continued support for this proposition.¹²

In this regard, the SCRUB Act differs in a critical respect from an otherwise comparable bill now pending in the Senate. Under S. 1390,¹³ introduced by Senators King and Blunt, a commission would make *recommendations* to Congress for rescission or modification of existing regulations. To become effective, however, its proposals would have to be affirmatively adopted

¹⁰424 U.S. 1 (1976).

¹¹*Id.* at 126.

¹²See also *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993), cert. dismissed, 513 U.S. 88 (1994) (Congress may not appoint the Clerk of the House and Secretary of the Senate to serve on the FEC, even as non-voting members).

¹³Regulatory Improvement Act of 2013, S. 1390, 113th Cong. (2013).

by a joint resolution. The SCRUB Act, in contrast, would empower the Commission to take actions that would have the force of law. It provides that the report of the RRRC would take effect unless it is *disapproved* by a joint resolution. And even if the report were so disapproved, it would remain binding on the agency by virtue of the Act's cut-go process. In substance, this is rulemaking power. In *Buckley*'s words, "[t]hese functions . . . are of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress. . . . These administrative functions may therefore be exercised only by persons who are 'Officers of the United States.'"¹⁴

In all likelihood, the Commissioners would not even be "inferior officers," but rather so-called "principal officers," who would have to be appointed by the President with confirmation by the Senate. In the recent *Free Enterprise Fund* case, Chief Justice Roberts noted for the Court that "[w]hether one is an 'inferior' officer depends on whether he has a superior," and that "'inferior officers' are officers whose work is directed and supervised at some level" by other officers appointed by the President with the Senate's consent."¹⁵ I have trouble seeing how the RRRC members could qualify as "inferior" under that test. But the distinction between principal and inferior officers doesn't really matter here, because, just as the Court said in *Buckley* about the FEC commissioners, the RRRC members would at the very least be "inferior officers," because they self-evidently would exercise "significant authority pursuant to the laws of the United States." If a special trial judge on the Tax Court¹⁶ or a judge on the Coast Guard Court of Criminal Appeals¹⁷ falls within that description, I cannot imagine any serious argument that the description would not also apply to the members of the RRRC, which would be empowered (absent supervening action by Congress) to force the repeal of any agency regulation that it considers unnecessarily burdensome.

Although the Appointments Clause problem alone makes clear that the bill should not be enacted in its current form, I believe I can be most helpful to the subcommittee if I assume for the sake of discussion that the bill may be amended to cure that problem, either by following the Senate model or in some other fashion. On that premise I will turn to the policy issues raised by the bill.

IV. The Commission

The establishment of an RRRC would constitute a sharp departure from past practice, which has always assumed that responsibility for retrospective review should rest primarily with the agency itself. Presidential plans to promote retrospective review have always rested this premise, as have the relevant recommendations of the ABA¹⁸ and ACUS.¹⁹ The premise is

¹⁴424 U.S. at 140-41.

¹⁵*Free Enterprise Fund v. PCAOB*, 130 S.Ct. 3138, 3162 (2010) (quoting *Edmond v. United States*, 520 U.S. 651, 662-63 (1997) (Scalia, J.)).

¹⁶*Freitag v. Comm'r*, 501 U.S. 868, 881-82 (1991); *id.* at 901 (Scalia, J., concurring).

¹⁷*Edmond*, *supra*, at 666.

¹⁸*Federal Agency Reviews of Existing Regulations*, 120-2 A.B.A. ANN. REP. 48 (1995).

logical because the agency, by definition, is the entity that Congress has entrusted with the responsibility to implement the overall regulatory program. It is one thing to say, as I did above, that agencies will often need some external pressure to reexamine longstanding policies that may have outlived their usefulness. But this is far from saying, as the bill does, that the agency should be ousted from its role by a commission composed as the RRRC would be.

The bill is plainly intended to follow the independent commission model of the Base Realignment and Closure Act (BRAC), but I think the analogy is not a strong one (aside from the fact that the BRAC system involved *recommendations* to the President, thus avoiding the constitutional problem in the SCRUB Act). The BRAC system was defensible in its own context, because the political system had largely agreed on a goal, namely to reduce the number of military bases. The difficulty was that ordinary decision processes made it difficult to decide *which* bases should be closed, because advocates for particular localities could derail the closure of their particular bases. The decision to entrust the selection of specific bases to a commission whose recommendations could not be amended was an understandable response to a breakdown in the legislative process due to local parochialism. With the RRRC, however, fundamental regulatory policy judgments would have to be made at every turn. Even if one could imagine that the Commission's computation of burdens would involve an objective judgment (a proposition that I would dispute), the question of whether the rules in question are *unnecessarily* burdensome would involve fundamental questions of regulatory policy. Conflicts between business interests and the protection of health, safety, and the environment run deep in our society, and the establishment of an independent commission of private citizens to make final decisions about those conflicts would raise legitimacy questions that go far beyond the BRAC precedent.

More particularly, I question whether the commission would have adequate qualifications to resolve those conflicts. With the exception of the Chair, who would have to be experienced in regulatory affairs (§ 101(a)(3)(A)), the Act states no qualifications whatsoever for the members of the Commission. Any selection by party leaders based on political patronage, or a desire to placate the party base, would do. In this regard the draft differs from S. 1390, which at least would require that all members of the "Regulatory Improvement Commission" be "prominent citizens of the United States with national recognition and a significant depth of experience and responsibilities in matters relating to government service, regulatory policy, economics, Federal agency management, public administration, and law."²⁰

But even if a clause articulating credentials of this kind were inserted into the SCRUB Act, it is apparent that the RRRC members would not necessarily have expertise or experience in each of the subject areas affected by the regulations that they would examine. The nine members

¹⁹ACUS Recommendation 95-3, *Review of Existing Regulations*, 60 Fed. Reg. 43,109 (Aug. 18, 1995).

²⁰S. 1390, § 3(b)(3).

might be expected to include, at most, one or two specialists in communications, energy, environmental protection, etc. Yet the regulations that govern these areas, and many others, are highly technical. The task of mastering their details could be quite challenging for those who do not know the area well. Furthermore, the rules in many regulatory programs are elaborately interconnected. I doubt that the RRRC members would have the broad perspective needed to make decisions in these areas. True, they would be (and should be) authorized to obtain assistance from the affected agency, GAO, OIRA other officials, and stakeholders.²¹ But when various stakeholders press competing plausible positions, would the RRRC members be well qualified to make the judgment calls needed to choose between these positions? Clearly, their qualifications would compare poorly with those of administrative agency heads who interact on a daily basis with career staff who can bring longtime experience and expertise to bear on highly specialized problems. Thus, the SCRUB Act would forego the very advantages that have led Congress to entrust these problems to administrative agencies in the first place.

Furthermore, the bill is antithetical to principles of democratic government, because, unlike the heads of an administrative agency, the commission members would not be politically accountable for their choices. It is not easy to justify entrusting such important value judgments as the rescission of administrative regulations to a group that would have no accountability, whether directly or indirectly, to the electorate or political leadership. The bill does not even provide, as S.1390 does, that the Commission's recommendations would have to be approved by Congress. In my view, the Senate bill's procedures for congressional involvement would not supply enough political accountability, because the legislative judgment would be limited to taking an up-or-down vote on the entire package, with no amendments allowed, after an extremely short period of review. These aspects of the plan for congressional consideration would prevent (indeed, are intended to prevent) the House and Senate from making decisions about the specific details of the package. In my view, this would not allow sufficient political accountability, but at least it is something (in addition to saving that bill from the constitutional flaw that infects the SCRUB Act). But the SCRUB Act would not provide even that fig leaf – the Commission's lack of political accountability for the highly consequential decisions it would be empowered to make would be absolute. Even the enactment of a disapproval resolution would only delay, not prevent, the Commission's decisions from going into effect.

The scope of power that the bill would entrust to the RRRC is breathtaking. The Act would essentially allow the RRRC to force repeal or amendment of *any* rule promulgated by *any* agency if it deems the rule's requirements to be unnecessarily burdensome. Although the Act lists a number of specific ways in which such burdensomeness might be demonstrated,²² the list is not exhaustive. Even if none of those criteria were met, the RRRC could rely on "[s]uch other criteria as the Commission devises to identify rules and sets of rules that can be repealed or amended to eliminate or reduce unnecessarily burdensome costs to the United States

²¹ SCRUB Act §§ 101(f)(3)-(5).

²² *Id.* § 101(h)(2).

economy.”²³ Moreover, although the RRRC is required to develop and post its “methodology,”²⁴ the bill says nothing about what that methodology must entail. Nor do I see anything in the stated criteria to indicate that the Commission would need to consider whether the agency would still be in compliance with its enabling legislation, or a court decree, if the targeted regulation were eliminated or amended.

Even if significant standards were to be inserted into the bill, the Title I process would put little if any pressure on the Commission to apply them carefully. Although the bill would instruct the Commission to summarize in detail the basis, purpose and substance of a classification,²⁵ there would presumably be no judicial review to monitor the quality of its reasoning and the factual grounding of its conclusions.²⁶ Nor would OIRA, or anyone else, play a quality control role in evaluating the Commission’s conclusions. The situation would be completely unlike agency rulemaking, in which external reviewers insist that the agency support its decision, whether regulatory or deregulatory, with a comprehensive analysis. Of course, these safeguards have been instituted precisely in order to ensure that an agency’s reasons will be factually grounded, rigorously analyzed, and consistent with the legal regime that the agency is required to implement. The loss of these safeguards does not bode well for the reliability of the Commission’s recommendations. In my view, checks and balances that can counteract unwise decisionmaking are an essential feature of the administrative law system, and their absence from the RRRC process is disturbing.

Indeed, in the case of a “major rule” (typically, a rule that in OIRA’s view will impose an annual cost of at least \$100 million on the economy), the Act would not even require a majority vote of the Commission. A *minority* of commissioners – four out of nine – could force the repeal of such a rule if the Chair were one of the four.²⁷ And they could do so even if their reasons were completely specious, because no one would be authorized to keep the repeal from going

²³*Id.* § 101(h)(2)(I).

²⁴*Id.* at § 101(h)(3).

²⁵*Id.* at § 101(i)(1)(B).

²⁶The assumption that judicial review would be unavailable is not entirely certain, because the RRRC would appear to be an “agency” within the meaning of the APA. However, the timetable that the Act sets up, whereby the Commission’s report would be placed before Congress for 45 days and then forwarded to the agency for immediate action, seems to imply that the sponsors intend for judicial review to be foreclosed. I would expect a court to follow the reasoning of Justice Souter’s concurring opinion in *Dalton v. Specter*, 511 U.S. 462, 479-84 (1994), concluding that judicial review of the BRAC Commission’s decisions was precluded. Justice Souter argued that the congressional timetable in that scheme indicated that litigation was not to hold up implementation of the commission’s decision following Congress’s review. Moreover, he noted that the Act in that case did provide for judicial review of some issues, but not base closure decisions. The SCRUB Act would lend itself to the same negative inference. The subcommittee may wish to clarify its intentions in this regard. However, I reach my interpretation of its probable intentions with ambivalence, because the absence of judicial review would constitute just one more reason to mistrust the reliability of the Commission’s work product.

²⁷SCRUB Act § 101(h)(4)(B).

into effect. Thus, the principle of majority rule would join all the other customary norms of public law that the Act would cast aside in the interest of promoting deregulation. Overall, the proposed grant of power to the Commission is remarkable, and the potential for arbitrary decisionmaking would be vast.

Many lawyers and judges, including quite a few who consider themselves constitutional conservatives, have advocated a revival of the long-dormant “nondelegation doctrine,” which was last used to invalidate a statute for excessive delegation almost eighty years ago in *A.L.A. Schechter Poultry Corp. v. United States*.²⁸ Were that to occur, the SCRUB Act would appear to be a glaring example of a statute that the doctrine would condemn. Indeed, Justice Cardozo’s memorable description of the Act involved in *Schechter* as “delegation running riot”²⁹ seems to be a pretty fair characterization of the draft bill under discussion today.

V. Cut-go Provisions

I now turn to the “cut-go” process spelled out in Title II of the draft bill. It will not surprise you to hear that I reject on principle the idea that an agency’s ability to adopt a new rule should in any way depend on its being required to abandon an older one that it may regard as well justified (even though the Commission, in a completely unreliable decision, might have concluded otherwise).³⁰ At the very least, presumably, the agency would need to conduct notice and comment proceedings on the question of *which* of the rules identified by the Commission should be the next one(s) to be repealed or amended. This issue would complicate the underlying rulemaking proceeding and pose an additional risk of reversal on appeal.

Indeed, one of the most startling aspects of the bill is that the cut-go process would come into play even if Congress has enacted a joint resolution to disapprove the Commission’s report. Considering how difficult it is these days for Congress to take *any* action, I am puzzled as to why the bill’s proponents would seek to nullify one of those rare events in which the legislative process does result in agreement.

However, even if the Title II process were justified in principle, the unwieldiness of the process would counsel against adopting it. The challenges an agency would face in implementing it would be daunting. The process would require the agency to quantify the costs of every new rule, no matter how trivial the rule might be. This is a substantial departure from current practice. The presidential oversight order, EO 12,866, requires a rigorous assessment of

²⁸295 U.S. 495 (1935).

²⁹*Id.* at 553 (Cardozo, J., concurring).

³⁰For a critique of analogous proposals, see Sidney A. Shapiro, Richard Murphy, & James Goodwin, *Regulatory ‘Pay Go’: Rationing the Public Interest*, Ctr. for Progressive Reform Issue Alert #1214 (Oct. 2012), http://progressivereform.org/articles/Regulatory_Pay-Go_1214.pdf.

costs only for “economically significant” rules (roughly the same as “major rules” as defined in § 501(3) of the SCRUB Act).³¹ For most rules, although costs are to be considered,³² the provisions that say so are essentially hortatory. The agency need not even make a written finding regarding them. Moreover, the order is clear in stating that some costs are difficult to quantify.³³ Even with regard to economically significant rules, the order requires quantification of costs only “to the extent feasible.”³⁴ All of these nuances and qualifiers in the executive order are completely brushed aside in the SCRUB Act.

Assigning quantitative values to the numerous consequences of a rule requires a substantial investment of resources, at least if the inquiry is to be conducted rigorously. It also entails highly artificial methods of attaching numbers to intangible cost factors. For the most important rules, this obligation can be justified “to the extent feasible.” But the SCRUB Act tacitly assumes that quantification is always feasible – a quite dubious proposition.

The Act also requires OIRA to certify the accuracy of the agency’s quantification of costs. This requirement, too, would result in an enormous expansion of OIRA’s functions. Under the executive order, OIRA reviews only the relatively small proportion of proposed rules that it deems “significant.”³⁵ This limitation has been regarded as a desirable means of allowing OIRA to concentrate its finite resources on those rules that need attention most. The cut-go process, however, would result in diffusion of those resources. (Notably, OIRA would *not* have authority to evaluate and press for improvement in the *Commission’s* cost calculations, no matter how shaky they might be.)

Finally, Title II provides that an agency could proceed with a new rule despite its noncompliance with the cut-go listings if it were to obtain affirmative approval of the rule from Congress.³⁶ In effect, this requirement would create a miniature REINS Act for rules in this category. As the subcommittee well knows, I testified in opposition to the REINS Act before you last year,³⁷ so it will be no surprise that I do not find this aspect of the SCRUB Act reassuring. I will not recapitulate my testimony here, except to repeat my observations that the difficulty of obtaining agreement among the House, the Senate, and the President would create a daunting and frequently insuperable obstacle to agency rulemaking and would raise additional constitutional questions of its own. For amplification, I refer you to my previous testimony.

VI. Retrospective Review of New Rules

³¹Exec. Order 12,866, 58 Fed. Reg. 51,735, § 6(a)(3)(C) (1993).

³²*Id.* §§ 1(a), 1(b)(6).

³³*Id.* § 1(a).

³⁴*Id.* § 6(a)(3)(C)(ii).

³⁵*Id.* § 6(b)(1).

³⁶SCRUB Act § 203(a)(4).

³⁷*Promoting Jobs, Growth, and American Competitiveness: Hearing on H.R. 367, the “REINS Act of 2013” Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 113th Cong. 65 (2013) (written statement of Ronald M. Levin).

Title III of the SCRUB Act would require an agency to include in the final issuance of any new rule a plan for review of the rule within ten years of its issuance. On this issue I will refer you to the analysis of the ABA Administrative Law Section in its comments on the Regulatory Accountability Act in 2011. I was one of the authors of those comments (although, to repeat, I am not testifying on behalf of the ABA today). The RAA contained a similar requirement, applicable to major rules only. The Section said in part:

We are [not] convinced . . . that the agency should formulate a plan for reconsideration of a major rule when it promulgates the rule. At that time, the agency will by definition be unaware of future developments that would be relevant to such a plan, such as the manner in which the rule will have worked out in practice, whether it will prove basically successful or unsuccessful, and what other tasks the agency will be responsible for performing when the review occurs (perhaps a decade later). The "plans" for decennial review are likely to be empty boilerplate. . . .

Moreover, a flat requirement that an agency must review all major rules at least once every decade will not always be a sound use of the agency's finite resources (not only budgetary, but also time and attention of key personnel). A study by the GAO indicates that, although reviews of existing rules can be useful, mandatory reviews are far more likely to lead to a conclusion that a rule needs no change than are reviews that an agency undertakes voluntarily. Thus, a better system for reexamination of existing rules may be one that requires a serious review commitment but gives agencies more flexibility to determine the frequency with which particular rules will be reviewed. The agencies' plans would, of course, be available for scrutiny and guidance from their respective oversight committees of Congress.³⁸

The SCRUB Act, however, goes much further by requiring the same procedure for *every* rule, not just every major rule. I have to assume that the subcommittee did not give sufficient thought to this manifestly extravagant requirement. Could the sponsors really mean to require an agency to prepare a plan for decennial review of rules that would have such minor impact that they would even be exempted from notice and comment requirements? Rules that would have no compliance costs at all, because they are instituted to distribute benefits rather than to impose burdens? Rules that are designed to address a short-term situation, so that they will not even exist ten years after they are promulgated? Rules of particular applicability, such as decisions approving corporate reorganizations? Section 301 is stunningly overbroad, but I am not going to recommend that it be trimmed back to encompass major rules, because even with that limitation it should be eliminated from the bill for the reasons stated by the ABA Section.

³⁸ ABA Section of Admin. Law & Reg. Practice, *Comments on H.R. 3010, The Regulatory Accountability Act of 2011*, 64 ADMIN. L. REV. 619, 659-60 (2012). The Judiciary Committee has reported out an almost identical bill, H.R. 2122, during the current Congress.

Section 301 goes on to provide that when an agency does conduct its decennial review of a major rule, its review should be “substantially similar” to the RRRC’s review of rules under § 101(h) to determine whether they are unnecessarily burdensome. In my previous testimony on retrospective review, I quoted from recommendations of the ABA and ACUS cautioning against the enactment of overly detailed specifications for lookback review. The nine subsections (not counting subparagraphs therein) in § 101(h)(2) would seem to fall within that description, even if they were not all completely onesided (as they are) in their focus on burdens as opposed to benefits. Again, in the interests of brevity I will simply refer you to that testimony for elaboration instead of repeating the same explanation here.³⁹

Finally, § 401 of the Act (constituting Title IV) provides that agency compliance with § 301 shall be subject to judicial review under the APA. The best thing that can be said for this provision is that it would probably do no harm, because it is difficult to see how anyone could have standing to sue under it. Standing requires a demonstration that the plaintiff has suffered or will suffer a real and immediate injury. Who could possibly demonstrate with any certainty that he has been injured by an agency’s failure to prepare a plan for decennial review or to conduct it according to the Act’s specifications? I doubt that anyone could meet that test, because the outcome of such a review would be completely speculative. But even if § 401 did result in some actual judicial review, I would not favor it, because of my disagreements with the obligations that such review would enforce.

VII. Conclusion

Despite my concerns about the specific model in the proposed SCRUB Act, I would not dismiss entirely the potential value of a commission approach in identifying and formulating a plan to deal with problems of obsolescence in a regulatory program. A better model would be one in which a specific area is chosen for examination in advance, and members with expertise and experience in that particular area are selected for service on the commission. Furthermore, the proposals of such a group should serve as *recommendations to the agency* responsible for the regulatory program. The high profile nature of the commission’s report would put pressure on the agency to consider it seriously, and other political actors could look to the report and lend support (or voice opposition). If the agency declined to follow some of the commission’s advice, it would have to justify that decision on judicial review. The agency would also be politically accountable for that refusal to the oversight committees of Congress and to the public. This approach, therefore, would obtain much of the benefit of an independent appraisal without displacing the agency as the body that is responsible for fulfilling the overall program prescribed by its authorizing legislation.

In light of the multiple difficulties with the current discussion draft, I would urge the subcommittee to approach the subject of retrospective review with greater caution. It would be a good idea to await the conclusions of the forthcoming ACUS study, which may suggest more productive ways in which the practice of retrospective review might be improved. If, however,

³⁹2012 Retrospective Review Testimony, *supra* note 1, at 7-8.

Mr. BACHUS. Thank you, Professor.

I will recognize myself for 5 minutes for questions.

The Ranking Member talked about the Administration's efforts to identify regulations that could be either eliminated or amended. I will ask each of you. How does the SCRUB Act compare to other executive branch and legislative proposals that have been brought forth in the past? I will start with you, Dr. McLaughlin.

Mr. McLAUGHLIN. I think the most fundamental difference is putting the responsibility for retrospective review in the hands of an independent commission as opposed to leaving it in the hands of the agencies who created the rules in the first place. And it is my opinion that that will improve the quality of assessment. To make a simplistic analogy here, I am a professor as well as a researcher, and if I let my students grade their own tests, I would expect on average their scores to be a lot higher than if an independent arbiter were to grade them and give an objective analysis.

Mr. BACHUS. Mr. Batkins?

Mr. BATKINS. I would agree with Mr. McLaughlin that there is, I think, a need for an independent look at retrospective review. And if you just look at all the data that we have compiled under Executive Order 13563, there are a few provisions that streamline, modify, reduce hours and costs, but on net, a majority of the provisions are actually new regulations that they are including in these retrospective reports. It is tough to tell the difference between a regular unified agenda of Federal regulations and a lot of these retrospective reports. Several agencies that were reviewed did not have a single measure that we found to actually look back at existing regulations. So I would agree that an outside voice is probably welcome.

Mr. BACHUS. Could you give me some specifics on those agencies that you are talking about?

Mr. BATKINS. Well, sir, I mentioned Health and Human Services. We counted, judging from the REN's from their report, there were at least nine Affordable Care Act regulations that they plan to implement. And for example, the Department of Energy had several new efficiency standards for transformers, for metal halide lamp fixtures. And a lot of agencies will include basically a boilerplate that this rule was designed to minimize burdens consistent with Executive Order 13563, and that may be fine but you could have used the same minimize burdens/maximize net benefits under Executive Order 12866 or Executive Order 12044. So it was not necessarily a regulatory look-back as it was implementing a new rule and putting it in your retrospective report.

Mr. BACHUS. Professor Levin?

Mr. LEVIN. Well, I agree with Mr. McLaughlin that the biggest difference is that the SCRUB Act would put an independent body into control rather than the agency. But I think that is a vice and not a virtue.

I think the better comparison would be if he asked me to grade his exams in his course when he is the one who runs the course, organizes it, and I am a complete outsider.

The problem is that the agency has always been rightly considered to be the best entity to evaluate the rules. They have the expertise. That is why Congress created it in the first place, to bring

specialized experience to bear. They are the ones who understand the overall program and all the interconnections among the different parts of the program. And they are the ones who are politically accountable in the way that a commission would not be. So we agree on the difference, but we do not agree as to its merit.

Mr. BACHUS. Are agencies really politically accountable for their actions?

Mr. LEVIN. For sure. The executive agencies are accountable to the President. All agencies are accountable to Congress. They are accountable at the initiation stage. Congress can change their laws. They have oversight hearings, as you well know, and they are part of an Administration that usually is very cognizant of public opinion.

Mr. BACHUS. Out of all the regulations that have been passed over the years, there has been one that has been repealed by Congress. Of course, you could look at that two different ways. One is that they have all been appropriate and another that Congress simply has lacked that because I think it is fair to say that there were probably in the universe of tens of thousands of regulations, there had to be hundreds, if not thousands, that were probably not well thought out.

Mr. LEVIN. But it is not just the congressional review act that you should take into account. Authorizing legislation will sometimes have that effect. And informal contacts through the oversight process will often have that effect because agencies are dependent on Congress in so many ways.

Mr. BACHUS. I think my time has expired.

At this time, I recognize the Ranking Subcommittee Member.

Mr. JOHNSON. Thank you.

Dr. McLaughlin, the Mercatus Center is a 501(c)(3) nonprofit that does not receive support from George Mason University or any Federal or State or local government and only receives funding through donations from companies like the Koch brothers. Is that correct?

Mr. McLAUGHLIN. Our organization is funded by private donations. However, we have a strict firewall between fundraising and research.

Mr. JOHNSON. No, no, no.

Mr. McLAUGHLIN. I am not familiar with the details of the fundraising.

Mr. JOHNSON. But companies like Koch Industries or companies that would be contributors or funders of your efforts. Is that right?

Mr. McLAUGHLIN. Again, I am not familiar with the details of our fundraising.

Mr. JOHNSON. Are you aware of the fact that the Mercatus Center moved to George Mason University after George Mason University accepted \$30 million from the Koch brothers?

Mr. McLAUGHLIN. That was prior to my time working at the Mercatus Center. So I did not experience that, if that is what occurred.

Again, what matters to me at least is that we have this firewall of separation between all of the fundraising and the research. My research is my own. It is not influenced or controlled by any donors.

Mr. JOHNSON. All right. Thank you, sir.

And, Mr. Batkins, have you ever heard of the American Action Network?

Mr. BATKINS. Pardon me? The American Action Forum. No. The American Action Forum is a 501(c)(3). Network is a separate organization with a separate board.

Mr. JOHNSON. And it is a 501(c)(4).

Mr. BATKINS. Correct.

Mr. JOHNSON. And it is your sister organization. Correct?

Mr. BATKINS. They have a separate board and a separate president.

Mr. JOHNSON. But you are sister corporations basically.

Mr. BATKINS. I rarely, if ever, have any interaction with the Network, and I focus purely on the policy analysis and regulatory policy, and I have never engaged in any political advocacy of the kind that the Network does engage in.

Mr. JOHNSON. The Network and the Forum are housed in the same offices. You are basically sharing office space with Crossroads GPS and American Crossroads. Is that correct?

Mr. BATKINS. That is not correct. American Crossroads, I believe, is off of New York Avenue and we are a few blocks away on Pennsylvania Avenue.

Mr. JOHNSON. What about Crossroads?

Mr. BATKINS. No. It is just the American Action Forum, the American Action Network.

Mr. JOHNSON. So you do not share office space with Crossroads GPS?

Mr. BATKINS. We do not.

Mr. JOHNSON. Have you ever?

Mr. BATKINS. During the formation of our organization in 2010, for a few months we did.

Mr. JOHNSON. And Crossroads GPS/American Crossroads is, of course, tied to Karl Rove.

Mr. BATKINS. That is my understanding, yes.

Mr. JOHNSON. Is the Forum or the Network still tied to Karl Rove?

Mr. BATKINS. No. That is a completely separate organization, again housed somewhere else with a separate board and a separate staff.

Mr. JOHNSON. Well, now, okay.

I would like to ask Dr. McLaughlin. On page 10, the bill uses terms such as, "excessive compliance costs" and also "excessively burdensome." What exactly do those terms mean, sir?

Mr. McLAUGHLIN. I think that is a great question. I agree with your statement that some terms could be interpreted with subjectivity. And I actually think that on page 11 of the bill, the statement that the commission shall establish a methodology for conducting its review hopefully goes to some length to addressing potential problems with subjectivity.

So it is my hope—and, in fact, I have a study that I just released this morning where I recommend methods for addressing the problem of regulatory accumulation, and one of the points that I make is an objective method of assessment is key. So I share your concerns, and I hope that can be dealt with.

Mr. JOHNSON. And tell me now, on page 13, the bill requires the commission to review a rule that is identified by the public? So does that mean that if the Mercatus Center identifies 1,000 rules that it believes should be reviewed, then the commission would be required to examine each and every one of those rules?

Mr. McLAUGHLIN. Well, I think that the provision for allowing the public or any entity to propose a rule is designed to make sure there is equal treatment of all. Whether one entity attempts to dominate that is perhaps something to be concerned with. It is similar to the current notice and comment process that is implemented by the Administrative Procedure Act. So if there is a problem with this, there is also a problem with that in that any entity can dominate the submission process.

Mr. JOHNSON. Thank you, sir.

And my time has expired.

Mr. BACHUS. Thank you.

At this time, I recognize the gentleman from Missouri, Mr. Smith.

Mr. SMITH OF MISSOURI. Thank you, Mr. Chairman.

Professor Levin, in the closing part of your statement, you—I just want to correct. I think you made the statement Federal agencies are reliant on Congress in some ways. Is that correct?

Mr. LEVIN. I am not sure exactly what you are referring to, sir.

Mr. SMITH OF MISSOURI. Just in your last few sentences, in your comments when you were giving oral testimony, you made the comment, Federal agencies are reliant on Congress in some ways.

Mr. LEVIN. I said that during my response to the Chairman.

Mr. SMITH OF MISSOURI. Okay, in your oral conversation.

Mr. LEVIN. Yes, sir.

Mr. SMITH OF MISSOURI. And that brings a very important point to me that I want to make sure is on the record for this Committee. Federal agencies are creatures of Congress. They did not just exist. Agencies are created by Congress, and Congress can pass whatever laws it sees fit to cabin the authority of these agencies when they create laws. You know, Federal agencies only exist because Congress has decided by law to delegate its legislative power to agencies. So that statement in saying that Federal agencies are only reliant on some ways to Congress where that agency was created because of Congress is a huge problem, especially coming from a gentleman that teaches at a great university in my State.

How do you respond to that?

Mr. LEVIN. Sure. What I said was that they are accountable. But I agree 100 percent with what you just said. They are creatures of Congress and they are subject to congressional revision, actually not 100 percent. Congress cannot pass a law that violates the Appointments Clause or other relevant constitutional restrictions. But broadly speaking, Congress can adjust their mandates. So on that, I think we essentially do agree.

Mr. SMITH OF MISSOURI. Exactly. So that goes forward with the concern that you said that this current draft violates the Appointments Clause, which I disagree with. But I think we both could agree—and you even said in your testimony that there could be areas where we could pass recommendations or we could just, in my opinion, put it directly in the legislative branch, much like Sen-

ator King and Blunt's bill over in the Senate. Would you not agree with that?

Mr. LEVIN. That would solve the Appointments Clause problem I believe. It would certainly not deal with all of the policy concerns. There is a potential non-delegation constitutional problem with what is contemplated, but it does solve the Appointments Clause part.

Mr. SMITH OF MISSOURI. But Congress has the power to say that we are going to create this commission to do this process, and in regards to appointing the individuals to serve on the commission, Congress can set the parameters. This is just a thought off the top of my head, but could Congress say that the President would need to appoint to this commission two out of the four nominations that the Speaker and the Minority Leader present to him?

Mr. LEVIN. The constitutional criteria for appointment are not well defined in case law. I would think certainly the Justice Department would tell you that that is a violation of the President's prerogatives to appoint.

Mr. SMITH OF MISSOURI. But does the Appointments Clause not also provide Congress has the power to decide in the appointment process of the President, of the courts, of the heads of departments. Correct?

Mr. LEVIN. Not the clause. I assume the Necessary and Proper Clause gives them some authority.

Mr. SMITH OF MISSOURI. I am talking about the constitutional clause of the appointments, the Appointments Clause that you brought up.

Mr. LEVIN. The Appointments Clause itself says the President shall appoint.

Mr. SMITH OF MISSOURI. But does it not say, in regards to inferior officers, that Congress can decide by law of those three different appointments of how they are appointed?

Mr. LEVIN. I do not think these are inferior officers. They have more power probably than any agency that exists today.

Mr. SMITH OF MISSOURI. But if Congress would say that these commissioners are inferior officers—

Mr. LEVIN. They would be mistaken.

Mr. SMITH OF MISSOURI. But we could do that.

So let us get to the policy process of this bill. Do you see that there is a need to reduce obsolete and duplicated regulations off the books?

Mr. LEVIN. Certainly.

Mr. SMITH OF MISSOURI. What percent would you think would be a good target rate? You know, like 1 percent, maybe 5 percent, 10? What do you think would be a good target goal in reducing some of these regulations off the books?

Mr. LEVIN. I would not set a target because I think the process of weighing the costs against the benefits is an enormously complex matter, and I think it would be unhelpful to set a numerical figure.

Mr. SMITH OF MISSOURI. So you would not want to say 1 percent of the regulations are probably outdated or obsolete?

Mr. LEVIN. I would not want to set a target figure because I think any such target would not be helpful in deciding which are the ones to eliminate.

Mr. SMITH OF MISSOURI. So do you feel like 174,000 pages of regulations is too many or not enough?

Mr. LEVIN. I think there are many areas where—many of them we do not need, and there are many more we do need. So how they net out I am not sure.

Mr. SMITH OF MISSOURI. So no response.

Thank you, Mr. Chairman.

Mr. BACHUS. Thank you.

At this time, I recognize the gentleman from Michigan, our former Chairman, Mr. Conyers.

Mr. CONYERS. Thank you, Chairman Bachus. And I thank the witnesses.

Let me ask my two friends, Mr. Batkins and Mr. McLaughlin, if you were persuaded—and I am not saying that you are already—that this provision could not pass constitutional muster, would that change your support for it? I will start off with Mr. McLaughlin.

Mr. McLAUGHLIN. Thank you.

First, I need to clarify that I am not formally endorsing this. I am merely comparing the components that are in the bill to what I have laid out in my own research, elements that are necessary for successful reform.

Secondly, I am a Ph.D. economist. I am not a constitutional lawyer, so I do not really have the wherewithal to weigh in on the constitutionality of the issue here. I apologize.

Mr. CONYERS. Well, that is okay. There are many Members of Congress who cannot either.

But the problem is that if you were confronted by the legal opinions of constitutional scholars, would that affect your opinion?

Mr. McLAUGHLIN. My opinion is that there is a lot of merit to addressing the problem of regulatory accumulation from an economics perspective, and I would hope that issues like the constitutionality of any approach could be ironed out by legal scholars so that the issue can actually be dealt with. So my support would go toward dealing with the problem.

Mr. CONYERS. Mr. Batkins, with the American Action Forum, how would you react to a finding of unconstitutionality on this draft measure that we are discussing here this afternoon.

Mr. BATKINS. Again, I just want to clarify that we did not as a (c)(3) sort of formally supported the bill, but just sort of the broad principles of retrospective review.

As to the constitutionality, that is not something that I discussed in my testimony. I understand that there is the presumption of constitutionality and that going forward, as this bill progresses, if there are serious defects, I am confident that they will probably be cured during the process.

Mr. CONYERS. Well, Professor Levin, would you care to make any comment about this issue that a number of us, including yourself, have raised already?

Mr. LEVIN. About the constitutional issue? Well, just to elaborate a little bit on this distinction that Representative Smith made between principal and inferior officers, which I did not address in my first remarks, but beyond the fact that any officer who exercises a significant authority must be appointed under the Appointments

Clause, some may only be appointed by the President with senatorial confirmation.

And to be an inferior officer, you would need a superior. Well, this commission is not supervised by anyone. So in my view, they would be principal officers. You would need presidential appointment and senatorial confirmation.

Mr. CONYERS. Thank you so much.

On page 10, Professor, you use the terms "excessive compliance costs" and "excessively burdensome." I wanted to review those with you. It seems like there is so much subjectivity involved that it is kind of hard for us to get it together.

Mr. LEVIN. Correct. They are entirely subjective or at least undefined.

Mr. CONYERS. Exactly.

Last, but not least, on page 13, the bill requires the commission to review a rule that is, quote, identified by the public, unquote. So if Mercatus Center identifies 1,000 rules that it believes should be reviewed, would the commission be required to examine each of these rules?

Mr. LEVIN. Since I had only 3 days to examine the bill, I am not sure about the specific point of what the scope would be. I generally agree with Mr. McLaughlin that a commission like this probably should look at submissions from the public. My problem is not that they are willing to listen, that they receive things from other people, but that I do not trust the conclusions they would reach.

Mr. CONYERS. Thank you so much, all of you.

I yield back the balance of my time, Chairman Bachus.

Mr. BACHUS. Thank you.

At this time, I recognize Mr. Doug Collins, the gentleman from Georgia.

Mr. COLLINS. Thank you, Mr. Chairman. I appreciate it.

I think this is definitely an opportunity to discuss the issues of transparency, the issues that we are dealing with here, and I think to include that further, I am going to yield the balance of my time to the gentleman from Missouri, Mr. Smith.

Mr. SMITH OF MISSOURI. Thank you, Representative.

Mr. McLaughlin, we were talking about having an independent commission. Right now how the process is that through executive orders, agencies monitor their own policy or ineffective or duplicated regulations. Correct?

Mr. McLAUGHLIN. Yes, sir. There have been a series of executive orders dating back decades that have exhorted agencies to review their own regulations. It is my opinion through research that none of them has had a substantive impact.

Mr. SMITH OF MISSOURI. So where I come from in Missouri, we would call that the fox guarding the henhouse. And that is why we need an independent commission that is going to do some serious work in finding these regulations and to see if they are doing what they are supposed to be doing.

What would you think would be a good target rate in what percent of maybe regulations that are out there that this commission could find that are duplicated or obsolete? Would you say 5 percent, 1 percent, 25 percent? I would like to have your judgment.

Mr. McLAUGHLIN. Unfortunately, I am not going to be able to give you a number. And I think part of the reason is we do not know. As you have said a few times, there are over 174,000 pages in the CFR. That would take something like 2 years of someone's life to read. So to get to the point where we know what percentage to get rid of, it will first require a careful assessment of what we have on the books in the first place. I think that the assessment that is done by agencies, even if it were to be objective, could probably not deal with the number of rules that they have created over the decades anyway.

Mr. SMITH OF MISSOURI. Mr. Batkins, would you want to give a target, a percentage of how many you think that may be out there that need to be amended or repealed?

Mr. BATKINS. I do not know that I could necessarily quantify it, but I can say that there is probably a lot of low-hanging fruit just from the reviews that I have seen from the Administration. It is 2014. There is a lot of electronic reporting, updating that we can do aside from the paper filings. I know that EPA has proposed rules for its National Pollution Discharge Elimination System and Hazardous Waste Management System that is moving toward electronic filing that, according to EPA, could save roughly \$200 million annually. So I think there is probably some low-hanging fruit in the CFR, and a lot of that might just be getting technology to 2014.

Mr. SMITH OF MISSOURI. Would you want to take a guess at a percentage?

Mr. BATKINS. Like I said, I do not know that I could necessarily quantify it.

Mr. SMITH OF MISSOURI. I am not going to hold you to it, but say 15 percent, 20?

Mr. BATKINS. I would say that the—it is not necessarily the case, but the older provision more or less might be more ripe for review and amendment. But again, we have added a lot to the books just in the last few years, but again, I do not know if I could quantify it.

Mr. SMITH OF MISSOURI. All right.

Professor Levin, have you read S. 1309, Senator King's and Senator Blunt's review commission, because you mentioned it in your testimony?

Mr. LEVIN. Yes, S. 1390, I believe it is.

Mr. SMITH OF MISSOURI. 1309.

Do you think that passes constitutional muster in the appointment of their commission?

Mr. LEVIN. As I recall—and again, I did not focus on that bill because it is not the one we are considering today, but roughly speaking, if the commission merely makes recommendations to Congress for Congress to act on, that is, in general, constitutional.

Mr. SMITH OF MISSOURI. And if a commission is solely rested within the legislative branch, would it be constitutional?

Mr. LEVIN. If it is solely a legislative agency, it cannot exercise executive power.

Mr. SMITH OF MISSOURI. Exactly. If the commission was just doing the work that was delegated to it by Congress but it sat

within the legislative branch, just like another Committee in Congress.

Mr. LEVIN. It depends on what the assignment is. The Supreme Court struck down the Gramm-Rudman Act in which power was entrusted to the Comptroller General because his actions were going to be legally binding, and you cannot ask the Comptroller General to do that.

Mr. SMITH OF MISSOURI. Thank you, Mr. Chairman.

Mr. COLLINS. I yield back, Mr. Chairman.

Mr. BACHUS. The gentleman from New York is recognized for 5 minutes.

Mr. JEFFRIES. Thank you, Mr. Chairman.

Dr. McLaughlin, would you say that this bill is designed to address an urgent problem that confronts this country?

Mr. McLAUGHLIN. I think it is a significant problem. Regulatory accumulation, as I noted in my testimony, has been found to slow economic growth substantially, and that harms everyone.

Mr. JEFFRIES. So it is urgent because excessive regulation exists. Is that correct in your view?

Mr. McLAUGHLIN. In my view the regulatory process we have in America results in consistent accumulation over decades. There is no process for getting rid of obsolete, duplicative, outdated, or ineffective regulations, at least no streamlined process. And I guess one way to put this is this is an opportunity for us to improve our economy at the rate of which—

Mr. JEFFRIES. What is the adverse impact of the outdated, cumulative, excessive regulations that you speak to that you have characterized as a significant problem? What is the impact on the economy?

Mr. McLAUGHLIN. Primarily it reduces innovation and entrepreneurship. People who would have undertaken some sort of entrepreneurial endeavor—maybe it could be—for example, Logan City, Utah was going to install—actually did install micro-hydropower systems in order to create some clean energy for local residents. But they ran into a lot of regulations that were duplicative and not applicable to this particular scenario. End result: the cost of this environmentally friendly endeavor doubled.

Mr. JEFFRIES. Okay. We have the world's most significant economy. I get that you are pointing to a situation in Logan City, Utah, and I am sure that is a wonderful place. But I am asking about the significant nature of the problem that you have indicated and for you to be able to point to evidence that exists as it relates to the impact of the economy. What evidence do you have in a macro-economic way?

Mr. McLAUGHLIN. Yes, sir. My testimony cites several studies that have been published in peer-reviewed academic journals, one of which is the one I cited in my testimony. However, others have been produced by scholars at the World Bank, the OECD. The evidence is it is wide-ranging that a regulatory system that does not address obsolete and duplicative or ineffective regulations—

Mr. JEFFRIES. Give me an example of an ineffective rule in the food safety area, for instance.

Mr. McLAUGHLIN. An effective regulation would be one that does not achieve its outcomes, does not have an effect.

Mr. JEFFRIES. I am asking for an example.

Mr. McLAUGHLIN. I am sorry?

Mr. JEFFRIES. Can you give me an example?

Mr. McLAUGHLIN. Of a regulation in food safety? I am not an expert in food safety.

Mr. JEFFRIES. Give me an example of a regulation that fits that description of being outdated, ineffective, non-constructive in the occupational safety area.

Mr. McLAUGHLIN. Well, there is a regulation that I am familiar with that is in the safety area. NHTSA, for example, requires headlights to be designed in a certain way, high beam and low beam, and the reason is you do not want the high beam to blind an oncoming driver. That regulation is, in my opinion, outdated because now adaptive headlight systems have been created, sold in Europe, sold in Asia, but not in America because this regulation prohibits them. This adaptive system would allow the high beam to be dimmed for the oncoming driver—

Mr. JEFFRIES. I am sorry to cut you off, but my time is limited.

Your position is that we need a presidentially-sanctioned, legislatively-authorized commission to deal with an outdated high beam regulation. That is essentially what you are here to testify to today?

Mr. McLAUGHLIN. The regulation is still impeding progress in our economy, and I am sure that is only one of many examples that could be found, were we to be able to go through all 174,000 pages.

Mr. JEFFRIES. Can you give me an example in the consumer safety area of an outdated regulation that is having a devastating impact on our economy that requires us to move forward with some degree of urgency and connected with this legislation?

Mr. McLAUGHLIN. Sir, I think your line of questioning is actually underscoring the point that we do need to do a thorough assessment of all these regulations. There is no way I can sit here and come up with example after example after example because I have not spent my time reading all 174,000 pages of regulations. However, we have a good suspicion, I think, on both sides of the aisle for all parties involved that there are some there that could be gotten rid of and could offer chances for—

Mr. JEFFRIES. All right, but sir, we are here to address problems that confront the American people, not enact legislation in search of a problem that heretofore, for me at least, has been ill-defined.

One last question. So you took the position that you are not familiar with the fact that the Koch brothers have provided funding assistance to the center that you work for. Is that your position on the record?

Mr. McLAUGHLIN. We have a firewall separating research from fundraising. I am not familiar with the details of fundraising. That is my position.

Mr. JEFFRIES. Thank you.

Mr. BACHUS. Thank you.

Professor, there have been three executive orders by this President to review regulations, to look for outdated regulations, duplicative regulations, those that have more of a detriment or cost than a benefit. Do you agree with an effort to systematically go through all the regulations and do a regulatory reform effort?

Mr. LEVIN. Mr. Chairman, I testified on this point in 2012, and I think there are diminishing returns to looking repeatedly at every regulation.

Mr. BACHUS. I am out of order.

Mr. Cicilline from Rhode Island.

Mr. CICILLINE. Mr. Chairman, thank you, and I thank the witnesses.

I will concede for the purpose of this hearing that there are some regulations that are duplicative and unnecessary and obsolete and we ought to eliminate them. I think each of us could find one.

But the notion of creating a new bureaucracy of unelected bureaucrats with no particular experience or expertise to make critical, often lifesaving determinations about issues ranging from safe chemical levels to energy standards, to health care is a frightening prospect and I think something that I would resist with tremendous resolve.

But I want to just try to understand how it would work, even if you had your way. Your legislation says that in this cut-go, that the cost of any new rule to the United States' economy has to be offset by a repeal. So I want to understand how we would calculate the cost of a new rule. So suppose you had a rule—and this is for you, Dr. McLaughlin—that said you have to have a level of this particular toxin below a certain amount because it proved to be very deadly to children. It is in children's food. And it would add a dime to the cost of food for children, but it would save countless lives. At high levels, it would cause infant death. It presumably would save thousands of lives. If you calculate the cost of the new rule to the U.S. economy, do you take into account not just the 10 cents but there is no requirement that you net out the children whose lives would be saved, the children who would be healthier because they are not ingesting the toxin? Is there anything in this legislation that would net out what the value of regulation is? And if not, how do you possibly implement it?

Mr. McLAUGHLIN. It is my understanding that the analysis of costs for the cut-go portion of the bill for any new rules proposed would actually be performed by the agency that is proposing those. Under their methods that they use right now, they perform regulatory impact assessment following OMB Circular—

Mr. CICILLINE. But, Dr. Levin, the statute that we are being asked to consider says the annual costs of the new rule to the United States' economy. There is no assurance that there is actually even an assessment done about what the net benefit of any regulation is. Right? And, of course, that is consistent with what you said in your opening comment where you said currently regulations by design restrict choices. Well, I guess that is true. It restricts the choice of a parent to have their child to eat food that is poisoned. But it does not just restrict choices. It also is about keeping people safe, for example. Would you agree? Regulations do not just restrict choices. They also keep people safe.

Mr. McLAUGHLIN. Regulations have both costs and benefits. Absolutely.

Mr. CICILLINE. Okay. Benefits are safety, health. Right?

Mr. McLAUGHLIN. Regulations can—

Mr. CICILLINE. And you agree we should take those into account before we make a determination as to whether or not to repeal a regulation. Correct?

Mr. McLAUGHLIN. I think that benefits should be weighed against costs.

Mr. CICILLINE. And in fact, you said in a letter to the editor to "The Hill"—and I quote. You wrote, "It is unlikely that anyone knows what the actual net benefits of regulation are although I maintain hope that further research can produce some reliable lessons." Those are your words.

Mr. McLAUGHLIN. Those are.

Mr. CICILLINE. So this bill would then allow individuals who have no expertise in a subject-matter area to make a determination as to whether or not a regulation should be repealed based on the offset that comes solely from the cost to the U.S. economy without any consideration of the benefits.

Mr. McLAUGHLIN. I do not think that is a completely correct characterization. I do not know that it would be consisting of people without expertise in the area. I actually tend to think that we should make sure they have expertise in the areas being reviewed.

Mr. CICILLINE. Well, do we not have another mechanism available to us, both through the APA and through statutory directives, obligating people who actually have responsibility and expertise in this area to do assessments and allowing individuals to petition for the repeal or review? Does there not already exist an infrastructure to do exactly what you are advocating for?

Mr. McLAUGHLIN. The problem with that infrastructure, sir, is that expertise does not necessarily equate to objectivity. So under current processes, the agencies review their own regulations, but it is not guaranteed that you will get an objective analysis. Agencies are stakeholders in this process.

Mr. CICILLINE. But if, in fact, an agency refuses to repeal a regulatory provision that ought to be repealed, that matter can then be taken up by the Congress of the United States through legislative action.

Mr. McLAUGHLIN. Something that I think is very rare.

Mr. CICILLINE. But there are mechanisms that currently exist to address the very problem that this legislation intends to address.

Mr. McLAUGHLIN. And the study that I released today and that I submitted to the record—if not already, I will make sure it is—I have addressed these efforts, and it is my conclusion that none of the methods that we have right now for retrospective review are making much difference.

Mr. CICILLINE. I thank you, Mr. Chairman, and yield back.

Mr. BACHUS. Thank you.

There is a vote on the floor. So at this time, we are going to wrap up.

You know, Senator Joseph McCarthy is dead, but the Ranking Member may want to actually—you went into the Koch brothers. You may actually want to talk to Professor Levin. He is actually in the Anheuser-Busch Hall. You might actually want to see if there is some tie-in with the beer industry, which I know does not exist.

Mr. LEVIN. I concede that I work in Anheuser-Busch Hall, Mr. Chairman.

Mr. BACHUS. We will not to explore your beer preferences or whether your work is influenced by being in the Anheuser-Busch Hall.

Mr. LEVIN. I try to give sober assessments, sir. [Laughter.]

Mr. BACHUS. Thank you.

Mr. JOHNSON. Mr. Chairman, if I might, I would like to offer, with unanimous consent, these two letters, one from the Natural Resources Defense Council and the other from the Coalition for Sensible Safeguards, both of which oppose the SCRUB Act. I would like to submit those for the record.

Mr. BACHUS. And the Natural Resources Defense Council—we could have predicted that. Could we not?

Mr. JOHNSON. Just as we could predict that Karl Rove and the Koch brothers are in favor of fewer rules.

Mr. BACHUS. Anheuser-Busch folks—they got to be in there somewhere.

Without objection.

[The information referred to follows:]



NATURAL RESOURCES DEFENSE COUNCIL

February 11, 2014

The Honorable Spencer Bachus
Chairman
House of Representatives Subcommittee on Regulatory Reform, Commercial and
Antitrust Law
Washington, DC 20515

The Honorable Hank Johnson
Ranking Member
House of Representatives Subcommittee on Regulatory Reform, Commercial and
Antitrust Law
Washington, DC 20515

Dear Chairman Bachus and Ranking Member Johnson:

On behalf of the Natural Resources Defense Council and its 1.4 million members and activists, I am writing to express our strong opposition to the draft bill, the "Searching for and Cutting Regulations that are Unnecessarily Burdensome (SCRUB) Act of 2014." Since there was so little time available to review the bill prior to today's hearing, we will submit more thorough comments later, but this bill is so radical and outrageous – really almost a parody of anti-regulatory efforts – that we wanted to make sure to provide some response today.

The bill would create a nine-member commission and then give five – or in some cases, just four – of its members the almost unlimited power to override, repeal or amend existing regulations (and, in effect, the statutes that authorize or require them). This amounts to nothing less than a self-inflicted coup d'etat. Under the bill, Congress would be able to slow this juggernaut of its own creation only if a majority in both houses of Congress – an exceptionally high hurdle, especially these days – voted to block this cabal. And under the bill, even such an extraordinary vote would only delay, not block the commission from undoing public protections. To actually block a commission rollback of a regulation, both houses of Congress would have to vote against the commission a second time – and that could be done only in the context of disapproving a new rule. (Perhaps the commission could be named HAL, after the unstoppable computer in "2001: A Space Odyssey.") It is especially ironic that this idea would be put forward by conservatives who still sometimes object to the constrained delegation of Congressional authority that the New Deal provided to federal agencies.

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And what is the rationale for this extraordinary perversion of Constitutional process? It's that regulation has supposedly entirely run amok, despite repeated studies showing that the benefits of regulation significantly outweigh its costs, and public support for safeguards remains high. The panic reflected in this bill also ignores all the existing Congressional and judicial oversight of the regulatory system. Indeed, events continue to highlight areas where regulation is insufficient – the West Virginia chemical spill being one recent example – but the bill does not even contemplate that prospect. But one hardly needs to be a fan of the regulatory system to blanch at the notion that the SCRUB Act amounts to anything like reasonable reform.

The bill goes on to require the elimination or amendment of regulations of the commission's choosing each time a new regulation – no matter how minor or routine – is added. This calculus, faulty in many regards, entirely ignores the benefits of regulations, growth in the economy or really any thought at all in its single-minded effort to eliminate safeguards.

The SCRUB Act is, in short, a model of bad law. It should be scrubbed from the Committee's agenda.

Sincerely,
David Goldston
Director of Government Affairs
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COALITION FOR SENSIBLE SAFEGUARDS

February 11, 2014

The Honorable Spencer Bachus
Chairman
House of Representatives Subcommittee on
Regulatory Reform, Commercial and Antitrust
Law
Washington, DC 20515

The Honorable Hank Johnson
Ranking Member
House of Representatives Subcommittee on
Regulatory Reform, Commercial and Antitrust
Law
Washington, DC 20515

Dear Member:

The Coalition for Sensible Safeguards urges members of this committee to oppose "The Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014." This complex bill would establish a new bureaucracy empowered to dismantle long-established public health and safety standards and would make it significantly more difficult for Congress and federal agencies to implement much needed protections in the future.

This legislation clearly ignores the lessons of last month's chemical spill in West Virginia, which demonstrated in vivid and tragic fashion the human and economic impact of allowing businesses to engage in excessively risky activities with little regulation or government oversight. In the ongoing aftermath of that spill, this committee should be looking for ways to strengthen our country's regulatory system by identifying gaps and instituting new safeguards for the public. Instead, this legislation does the opposite.

This legislation would establish a new "regulatory review" commission which is funded at taxpayer expense and charged with the unbalanced mission of identifying duplicative, redundant or so-called "obsolete" regulations to repeal, while doing nothing to identify the numerous gaps, shortfalls, and outdated regulatory standards that leave the public vulnerable to the next public health tragedy. The main criterion to be considered is the cost of the regulations to the economy, not the benefit of the protections to the public.

Ironically, this commission would itself be redundant and duplicative given the Executive Order¹ adopted by President Obama that already requires federal agencies to identify and remove regulations in a similarly unbalanced manner. Not only is there no justification for this commission to duplicate the

¹ Exec. Order 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

administration's retrospective review initiative, but the administration's continuing work in this area has significantly reduced the existing stock of unnecessary regulations that forms the central premise of this commission. Consequently, it is very likely that this legislation will result in a commission that seeks to repeal rules that are in fact continuing to protect the public.

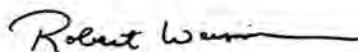
To make matters worse, the legislation imposes a regulatory "cut-go" system that ties agency hands when public health crises require timely regulatory responses and prevents agencies from implementing legislation mandated by Congress to protect the public from emerging threats. Any agency that issues a new regulation would be required to remove an existing regulation of equal costs; no consideration is given to the benefits of regulations. Beyond impacting these basic and vital agency functions, the legislation does nothing to ensure that the regulations that survive the new "cut-go" procedures are the most cost-efficient and beneficial for the public, those that maximize the net benefits. In addition, the legislation's "cut-go" procedures simply make no accommodation for the many regulations that are mandated by Congress with a statutory deadline. Regulatory protections that do not comply with the legislation's "cut-go" procedures would have to be approved by each house of Congress and the President pursuant to H.R. 367, the controversial and radical "Regulations from the Executive in Need of Scrutiny Act" also known as the REINS Act. REINS would extend the prevailing dysfunction and gridlock in Congress to the regulatory system by permitting a single chamber in Congress to effectively veto new regulations. Incorporating REINS into this legislation only makes it more harmful by making it practically impossible for agencies to bypass the "cut-go" procedures, however urgent the circumstances may be.

The American public should not have to bear the enormous human and economic costs of public health and safety disasters that continue to occur far too often as a result of our broken regulatory system. This committee should be proactively looking for ways to avoid the next deregulatory tragedy by making sure the regulatory system works for America's families, not for well-funded corporate interests and hold those who violate regulatory safeguards fully accountable. We strongly urge opposition to this legislation. It represents a significant step in the wrong direction.

Sincerely,



Katherine McFate, President and CEO,
Center for Effective Government
Co-chair, Coalition for Sensible Safeguards



Robert Weissman, President,
Public Citizen
Co-chair, Coalition for Sensible Safeguards

The Coalition for Sensible Safeguards is an alliance of consumer, labor, scientific, research, good government, faith, community, health, environmental, and public interest groups, as well as concerned individuals, joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all.

Mr. JOHNSON. Thank you.

Mr. BACHUS. This hearing is adjourned.

Professor Levin, I would like to explore with you whether there is some bipartisan way to—you talked about—to look at these regulations.

Mr. LEVIN. I take it you are wrapping up, but I would be happy to work with the Subcommittee over time in looking at alternative ways of dealing with retrospective review.

Mr. BACHUS. Thank you.

This concludes today's hearing. Thanks to all our witnesses for attending.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is adjourned.

[Whereupon, at 2:31 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary

Just over six months ago, President Obama announced that he would once again pivot to the economy. The bottom line of his speech: after four-and-a-half years of the Obama Administration, “We’re not there yet.”

The President was right. We were not there yet. Regrettably, the same can be said today. Job creation and economic growth continue to fall short of what is needed to produce a real and durable recovery in this country. The nominal unemployment rate is down, but that is not because enough workers have found jobs. It is because so many unemployed workers have despaired of ever finding new full-time work that they have left the work force or settled for part-time jobs.

As long as this situation continues, Congress must stay focused on enacting reforms that will stop the losses, return America to prosperity and return discouraged workers to the dignity of a good, full-time job.

Throughout this term of Congress, the Judiciary Committee and the Subcommittee on Regulatory Reform, Commercial and Antitrust law has worked hard to produce the regulatory reforms that will help to produce these results. Today, we turn to one of the biggest remaining pieces of the puzzle—how to clear the clutter of outdated and unnecessarily burdensome regulations that too often keep growth and job creation down.

For years, there has been a bipartisan consensus that this is an important task that must be performed. But, as with so many things, the hard part has always been the details. Different approaches have been tried by different presidential administrations, and some solutions have been offered by Congress. But, to date, no sufficiently meaningful results have been produced.

In many ways, this must be because past approaches have never fully aligned the incentives and tools of all of the relevant actors—regulatory agencies, regulated entities, the President, the Congress, and others—to identify and cut the regulations that can and should be cut. On their own, regulators have little incentive to shine a spotlight on their errors or on regulations that are no longer needed. Regulated entities, meanwhile, may fear retaliation by regulators if they suggest ways to trim the regulators’ authorities. And the sheer volume of the Code of Federal Regulations—which contains well over 150,000 pages of regulations—presents a daunting task for any Congress or President to address.

The SCRUB Act represents a real step forward in our attempts to identify a way to cut the forest of federal regulations down to size without compromising needed regulatory objectives. By establishing an expert commission with the resources and authority to assess independently where and how regulations are outdated and unnecessarily burdensome, it overcomes the disincentives for agencies and even regulated entities to identify problem regulations.

In addition, by providing a fast-track legislative method to green-light repeal and amendment of the highest priority regulations, the SCRUB Act assures that we will take care of the biggest problems quickly. Further, by instituting regulatory “cut-

go” measures, the bill assures that the rest of the work of cutting regulations will finally happen.

Finally, by instituting efficient means for Congress to provide the ultimate checks on the regulatory review exercise, it assures that the Legislative Branch has the ultimate say over the exercise of legislative authority it delegates to agencies.

I urge my colleagues to support the RAPID Act and cut down the time it takes America’s workers to see a real Jobs Recovery.



**Response to Questions for the Record from Patrick McLaughlin, Ph.D.,
Senior Research Fellow, Mercatus Center, George Mason University**



**Questions for the Record from
Ranking Member Hank Johnson and Representative John Conyers, Jr.
for the Hearing on H.R. ___, the "Searching for and Cutting Regulations that are
Unnecessarily Burdensome (SCRUB) Act of 2014"**

February 11, 2014

Questions for Dr. McLaughlin

1. At several points in the bill, the term "costs to the United States economy" appears, but it is not defined.

Does the term include "transfer" rules, i.e., rules that simply involve federal money flowing to nonfederal entities such as:

Medicare/Medicaid payments?

Food stamps?

Crop subsidies?

Response: As an economist, I defer to the committee's members and professional staff on the legal meaning of the bill's terms.

2. On page 10, the bill uses terms such as "excessive compliance costs" and "excessively burdensome."

What is exactly meant by these terms?

Doesn't the assessment of "excessive" involve a matter of subjective intent?

Response: As an economist, I defer to the committee's members and professional staff on the legal meaning of the bill's terms.

3. On page 13, the bill requires the Commission to review a rule that is "identified by the public."

So if the Mercatus Center identifies 1,000 rules that it believes should be reviewed, would the Commission be required to examine each of these rules?

Similarly, would the Commission be required to examine the 1,000 rules identified by the Heritage Foundation, in addition to the 1,000 rules identified by

the Chamber of Commerce, in addition to the 1,000 identified by the National Federal of Independent Businesses?

Response: The process suggested by the bill seems designed to permit public comment and input on the regulatory review process. The APA's notice-and-comment procedure for federal rulemakings similarly allows members of the public to weigh in on rulemakings. Whether the commission would be required to examine every rule submitted for review by a member of the public is not clear to me. On the other hand, the bill also requires that any such submission be accompanied by evidence that the rule meets the criteria for repeal or amendment set forth elsewhere in the bill. Such information could prove valuable to the commission as well to the public at large.

4. Page 15 of the bill states that the Commission is required to "identify the annual cost of the rule," but is silent about the rule's benefit.

Thus, if the annual cost of the rule is \$20 million, but its benefits are \$200 million, is that relevant to the Commission's analysis?
Should it be relevant?

Response: Information on a rule's benefits is relevant to the commission's analysis of rules. The commission's review criteria set forth in (h)(2) includes several different considerations of benefits, such as whether the rule under consideration is effective at achieving its goal (i.e., benefits achieved by the rule), whether the rule's costs are not justified by the rule's benefits to society, and whether the rule has achieved its goals and is no longer needed in its current form.

5. Page 16 requires agencies to repeal or amend rules recommended by the Commission within 60 days.

Would such repeal or amendment require a rulemaking?

Should the agency be required – as per the Administrative Procedure Act – to publish such repeal or amendment in the Federal Register for public comment?

Would that process take more than 60 days?

What if such repeal or amendment requires congressional action?

Response: As an economist, I defer to the committee's members and professional staff on the legal meaning of such terms.

6. Page 24 of the bill states that the Commission can be funded to up to 1% of unobligated funds or \$25 million, whichever is greater.

What does "unobligated" mean?

Isn't it true that at the beginning of an agency's appropriations cycle, all of its funding is unobligated?

Response: As an economist, I defer to the committee's members and professional staff on the legal meaning of the bill's term.

7. Does the bill's retrospective review requirement apply to all rules, even the most mundane and technical?

Would it apply, for example, to Coast Guard bridge opening schedules, which can number up to 1,000 a year?

Would it apply to FAA airworthiness directives?

Response: The bill defines the term "rule" according to the meaning given under section 553 of title 5 of the United States Code. I do not know if the schedules and directives you referenced above are covered by that statutory definition.

8. The bill only requires the Commission chair to have expertise in administrative law, which means the other eight members do not have to have such expertise.

How would these Commission members be able to second guess the appropriate level of a carcinogenic contaminant in drinking water?

Response: It is unlikely that individual commission members could possess all of the wide-ranging expertise necessary to evaluate all of the rules reviewed by the commission. The bill enables the commission to consult experts, including agencies, as well as to appoint personnel from the public and private sectors. I would hope that these consultations and appointments would create the necessary expertise. Nevertheless, the bill could be more detailed on the range of experience and expertise that should be represented among the commission's members, such as administrative law, regulatory economics, and rulemaking.

9. Section 101(a) of the bill requires the Commission to only look for ways to repeal or weaken regulations.

Is the Commission, under the bill, prohibited from making recommendations to strengthen rules so that they are more effective?

Response: The commission's analysis criteria include elements that should yield valuable information on regulatory effectiveness. As an economist reading the bill, I do not see any provisions that would prohibit the commission from making recommendations on amendments to rules that could improve their effectiveness.

10. How would section 101(h)(2)(B), which requires the Commission to only consider the benefits to society "within the United States," apply to greenhouse gas regulations?

Response: I do not have a research concentration in greenhouse gas regulations and thus lack the expert knowledge to analyze how this provision would apply in that specific context.

11. What are the ramifications of section 101(h)(4)(B), which allows less than a majority of the Commission's members to eliminate or weaken major rules that are authorized by law and adopted after the constitutionally mandated process of notice and comment?

Response: As an economist, I do not know the legal ramifications of this section.

12. Why, in your opinion, do you believe the Commission envisioned by the SCRUB Act is constitutionally suspect?

Response: As a non-lawyer, I do not know if the legislation is constitutionally suspect or not.

13. In your testimony, you make several references to the number of the pages of the Code of Federal Regulations.

Do you know how many pages of the CFR are devoted to purely technical rules?

Do you know how many pages of the CFR concern the 1,000 or so U.S. Coast Guard rules pertaining to bridge opening schedules?

Response: I do not know what "purely technical rules" means, as that is not a clearly defined category of regulations under the CFR. I do not know how many pages of the CFR concern Coast Guard bridge opening schedules.

14. You discuss the problem of compliance costs and cite, as an example, the fact that "restaurants sometimes must pay to have food inspectors perform inspections in the evening."

Are these nocturnal inspections required because of federal regulation?

Response: The USDA performs inspections of businesses that are licensed to ship meat across state lines. As an example, an interview published by CNN¹ states that an entrepreneur whose business engages in mail order barbecue sales has to "jump through hoops to keep [her] inspector happy, under threats of taking away [her] license if [she] doesn't listen. The inspector just comes by unannounced between 6:30 AM and 3:00 PM. If [the business] chooses to work later than those hours, the inspector charges [them] \$125 per hour for overtime."

15. You complain about the National Highway Traffic Safety Administration's regulations regarding headlights.

¹ See Lea Richards, *Regulation Nightmares*, CNN MONEY (Sept. 22, 2011, 3:40 PM), http://money.cnn.com/galleries/2011/smallbusiness/1109/gallery_regulation_nightmares/4.html.

Are you familiar with section 553(e) of the Administrative Procedure Act?

Do you know if anyone has petition the NHTSA to review its headlight regulations?

Response: Yes, I am familiar with section 553(e) of the Administrative Procedure Act. I do not know if such a petition has been made.

16. Would you purchase powdered infant formula from a Chinese manufacturer?

Response: As I have no children, I have no experience in purchasing powdered infant formula.

17. Professor Levin suggests that a better model for a retrospective review commission would be to limit the subject matter area scope of its review and select commissioners with expertise and experience in that particular area. He also suggests that the commission make recommendations to the agency responsible for the regulatory program at issue.

What is your view of Professor Levin's suggestion?

Response: Professor Levin's suggestion is similar in certain respects to my own proposal for a regulatory review commission. I have proposed that an independent commission, consisting of experts on a limited set of subjects, review all rules related to those subjects. I also propose that the commission is then repeated so that other subjects are addressed. See McLaughlin and Williams (2014) in the record of this hearing.

Whether Professor Levin's suggestion is "better" would depend on whether the commission is to be repeated with a different subject matter scope. The drawback of limiting the scope is that a one-time commission may not have the opportunity to address other important subjects.

18. Your testimony discusses a problem of "non-functional" rules and call for a sweeping remedy, such as BRAC style commission to recommend repeal of obsolete regulations, but your statement provides no examples of specific rules on the books today that could meet that description.

Please provide a list of rules that could be deemed to be non-functional?

How many are there in your estimation?

Response: We cannot know the number of rules that are nonfunctional until the necessary analysis to make that determination is done. This is why a commission, with a staff and experts at its disposal, is necessary to accomplish this task.

19. A February 2014 Working Paper that you co-authored entitled "The Consequences of Regulatory Accumulation and a Proposed Solution" identifies criteria for elimination of non-functional rules.

Please define the rationale and the criteria that, in your opinion, should be used for determining a non-functional rule from a functional rule.

The February 2014 working paper, coauthored with Richard Williams, proposes criteria for *identifying* nonfunctional rules. We wrote:

To be categorized as functional, a rule must address current and significant risks (or, more generally, problems). Rules may not do that if they are outdated, but it may also be the case that they never actually did. It is also possible that the regulations addressing particular risk issues have worked and the risks have been reduced to safe (*de minimis*) levels.² In other cases, the rules may be addressing significant risks but not actually mitigating those risks. Again, it may be the case that they did mitigate the risk at some point but do not now. Table 1 below shows our proposed first test for whether a rule is functional or nonfunctional.

Table 1. The First Test for Functionality of a Rule

	Significant risk	Nonsignificant risk
Current risk	Functional	Nonfunctional
Noncurrent risk	Nonfunctional	Nonfunctional

However, even if a rule qualifies as functional in the first test, a second wave of tests may still find it nonfunctional. These tests include the weighing of unintended consequences, including risk-risk tradeoffs; the duplication of and possible interference with other rules; and a current benefit-cost analysis.

First in that wave of secondary tests is the weighing of unintended consequences. Some existing rules have unintended harmful consequences that may more than offset the direct benefits of the rules. These consequences may not have manifested themselves immediately after the rule's promulgation, but may have grown apparent over time. [...]

Second, rules may directly reduce safety if they interfere with other rules. This is the result of adding more safety rules that eventually begin to interfere with the ability to consider other safety issues, possibly leading to less overall safety. [...] As the number of rules increases, the likelihood of rules interfering with each other increases. Even if they do not directly cause interference, it may [be] useful to classify rules that are duplicative as nonfunctional, in order to at least reduce the cost of learning about two regulations instead of one.

Finally, more generally, the benefits of complying with existing rules may no longer be worth the cost. In all of the above cases, this general condition would be

² It may be that even though risks are reduced to *de minimis* levels, further enforcement is needed if it is found that market mechanisms have not supplied sufficient incentives to stay at those risk levels.

necessary to make the rule nonfunctional. OMB has stated, “The only way we know to distinguish between the regulations that do good and those that cause harm is through careful assessment and evaluation of their benefits and costs.”³

20. In that paper, the only example that was provided was an FDA regulation dealing with the “width of strings in canned string beans.”

Are there other regulations that you or others have identified that meet the suggested test for a non-functional rule?

Our proposed method of classifying rules as functional or nonfunctional is, to the best of my knowledge, novel. I am not aware that anyone has systematically analyzed a set of rules to identify those that may be nonfunctional based on our stated criteria.

21. One problem your paper identifies is that “regulations take years to develop and are outdated by the time they are created.” The Government Accountability Office found it can take OSHA an average of 7 years to issue a new health and safety standard, and in some cases as long as 19 years.

Please identify specific statutes or administrative procedures that contribute to this delay.

Response: Static regulations can become dated due to changes in technology or business practices. The full context of the quote from my paper makes this clear: “[R]egulations tend to be static and managers must deal with dynamic risks. As the technology changes, new risks emerge. Regulations take years to develop and are often dated by the time they are created. Dealing with nonfunctional and static regulations crowds out scarce resources that could be devoted to newer, emerging risks. These risks could come from new technologies, new production methods, new products, or new sources of labor.”

22. What actions would you recommend to shorten the time to develop regulations so that they are not out dated by the time they are implemented, or could be updated quickly as technology and scientific knowledge evolves?

Response: Markets rapidly respond to and elicit changes in technology. To the degree feasible, a functional regulation should emulate how markets achieve this. People who are competing in a market have incentive to dynamically respond to consumer demands in order to make the best possible product. This incentive drives market participants to innovate and develop new technologies. On the other hand, regulations sometimes are static in their design. Design standards that tell automakers that they must build cars with high beams, low beams, and nothing in between are a perfect example. This static regulation cannot easily adapt to new technologies that could blend high and low beams in order to create a safer environment for roadside pedestrians. This drawback could have been avoided if the regulation had been designed to create a performance standard rather than a design standard. A performance standard-based

³ Office of Management and Budget, Report to Congress on the Costs and Benefits of Federal Regulations, 1997.

regulation in this example could have specified that automakers install headlight systems that do not shine light at oncoming drivers in excess of some maximum allowable threshold so as not to blind oncoming drivers—which is the safety feature that low beams are supposed to achieve. Such a performance standard could easily accommodate the development of new technologies that shine the equivalent of low beams onto oncoming cars while maintaining more light on the sides of the roads where pedestrians may be walking.

**Response to Questions for the Record from Sam Batkins,
Director of Regulatory Policy, American Action Forum**

**Questions for the Record from
Ranking Member Hank Johnson and Representative John Conyers, Jr.
for the Hearing on H.R. ___, the “Searching for and Cutting Regulations that are
Unnecessarily Burdensome (SCRUB) Act of 2014”**

February 11, 2014

Questions for Mr. Batkins

1. At several points in the bill, the term “costs to the United States economy” appears, but it is not defined.

Does the term include “transfer” rules, i.e., rules that simply involve federal money flowing to nonfederal entities such as:

Crop subsidies? I would not imagine that “transfer” rules would be included in the term “costs to the United States economy.” However, some transfer rules do contain costs and OIRA does discuss possible costs of transfer rules in its annual report to Congress. There are some transfer rules that impose paperwork obligations on states or affected entities, and obviously, those could impose monetized burdens. I would define “costs” as any federal obligation that requires a private person, organization, or local government to expend time or money.

2. On page 10, the bill uses terms such as “excessive compliance costs” and “excessively burdensome.”

What is exactly meant by these terms?

“Excessive compliance costs” is a term that the bill’s sponsor or the proposed Commission could define further. It could refer to the \$100 million threshold for a “major” or “economically significant” regulation, or simply to a regulation that imposes more costs to society than it generates in benefits.

3. On page 13, the bill requires the Commission to review a rule that is “identified by the public.”

So if the Mercatus Center identifies 1,000 rules that it believes should be reviewed, would the Commission be required to examine each of these rules?

It’s my understanding that the Administrative Procedure Act already allows parties to petition to review a particular rule. Public input is an important part of the rulemaking process and it should remain an important component if the proposed Commission is formed. Nothing in the bill’s language would prohibit progressive groups from identifying thousands of rules to review. If there were

thousands of rules ripe for repeal now, I would imagine a list would already be public. That is why the work of the proposed Commission is so important. We have no idea how many outdated or redundant rules there are in the Code of Federal Regulations. This lack of information does not benefit officials who protect public health or safety, or businesses and individuals who must comply with arcane rules.

4. Page 15 of the bill states that the Commission is required to “identify the annual cost of the rule,” but is silent about the rule’s benefit.

I believe benefits should be relevant and they would be relevant in the proposed Commission’s analysis. According to the language, the proposed Commission could identify a “set of rules to the economy [that] are not justified by the benefits.” This “net benefits” threshold has always been an important aspect of regulatory analysis. Thus, if a rule were found to impose \$20 million in costs, but generates \$200 million in benefits, it would probably not be recommended for repeal.

5. Page 16 requires agencies to repeal or amend rules recommended by the Commission within 60 days.

Would such repeal or amendment require a rulemaking? I’m not familiar with that specific aspect of the legislation.

Should the agency be required – as per the Administrative Procedure Act – to publish such repeal or amendment in the Federal Register for public comment? I support an open and transparent rulemaking process and any legislative reforms that increase public input.

Would that process take more than 60 days? I don’t have the necessary information to speculate on how long the process could take.

What if such repeal or amendment requires congressional action? It’s my understanding Congress can disapprove of the Commission’s immediate repeal recommendations.

6. Page 24 of the bill states that the Commission can be funded to up to 1% of unobligated funds or \$25 million, whichever is greater.

What does “unobligated” mean? I’m not an expert in fiscal or budgetary policy, but in general, unobligated means funds that have not been committed to a specific source.

Isn’t it true that at the beginning of an agency’s appropriations cycle, all of its funding is unobligated? Yes, that is my understanding.

7. Does the bill's retrospective review requirement apply to all rules, even the most mundane and technical?

Would it apply, for example, to Coast Guard bridge opening schedules, which can number up to 1,000 a year? *The legislation likely applies to all rules, including Coast Guard schedules and airworthiness regulations. However, as discussed below, airworthiness directives are typically one-time repairs to aircraft. I do not think these routine rulemakings will consume much, if any, of the proposed Commission's work.*

8. The bill only requires the Commission chair to have expertise in administrative law, which means the other eight members do not have to have such expertise.

How would these Commission members be able to second-guess the appropriate level of a carcinogenic contaminant in drinking water? *I do not believe any Commissioner will "second-guess" scientific judgments. However, it is important that all proposed Commission members are independent and, perhaps more importantly, critical thinkers. Professor Levin gave the impression that the proposed Commission could not operate effectively because not all members would be issue area experts in every title of the Code of Federal Regulations. Others maintain that federal courts should not second-guess federal agency decisions, and the standard of review should offer more deference to agencies. One does not need to have studied a certain topic for thirty years to determine whether a program is operating efficiently or if a rule is redundant or outdated. When Professor Richard Feynman was asked to investigate the space shuttle Challenger disaster, he had no special insight into the construction or operation of the shuttle, but his thinking was a leading factor into what caused the accident. Disqualifying everyone but an "issue area expert" is a straw man designed to exclude all but a certain class. Agencies are second-guessed every time they open a rulemaking to public comment or submit a regulation to inter-agency review. Staffers at OIRA do not possess the same issue area expertise as regulatory agency staffers, but they have been an important component in regulatory review for more than 30 years. Commission members do not need a JD or PhD to review federal rulemakings. We should not conflate issue area expertise with program evaluation skills.*

9. Section 101(a) of the bill requires the Commission to only look for ways to repeal or weaken regulations.

Is the Commission, under the bill, prohibited from making recommendations to strengthen rules so that they are more effective? *It's my understanding that the Commission could amend rules to maximize net benefits. This could involve reducing costs and increasing benefits.*

10. How would section 101(h)(2)(B), which requires the Commission to only consider the benefits to society “within the United States,” apply to greenhouse gas regulations?
Greenhouse gas reductions generate benefits internationally and domestically, according to recent regulatory analyses. Because climate change is inherently a global concern, the majority of “benefits to society” would accrue abroad, but there would nevertheless be benefits to the United States as well.
11. What are the ramifications of section 101(h)(4)(B), which allows less than a majority of the Commission’s members to eliminate or weaken major rules that are authorized by law and adopted after the constitutionally mandated process of notice and comment? *I have no opinion on this part of the Commission’s activities, only that regulatory reform should be a bipartisan process that eliminates duplicative and outdated regulations. Past regulatory reform has passed with overwhelming bipartisan majorities and if the proposed legislation is signed into law, I’m confident it will be supported by strong majorities in the House and Senate.*
12. Why, in your opinion, do you believe the Commission envisioned by the SCRUB Act is constitutionally suspect? *As I testified during the hearing, I did not address the constitutionality of the legislation. If there are significant concerns, I am confident they will be cured as the legislation moves through the Judiciary Committee.*
13. You state that 3,600 rules are issued annually.

Do you know, for example, how many of these rules are purely technical? We recorded roughly 6,200 proposed and final rules in 2013, with more than 3,650 final rules. Of this sample, there were 509 rulemakings that monetized costs or benefits, and 281 rulemakings that quantified paperwork burden hours. However, 265 of the 509 rulemakings were “Airworthiness Directives.” They do impose costs, an average of \$4.4 million, but these are one-time repairs to aircraft and will not likely be a focus of the proposed Commission.

Do you know whether this number includes the roughly 1,000 rules that the Coast Guard promulgates each year dealing with bridge opening schedules? We examine the Federal Register daily and I believe that Coast Guard regulations are included in the total tally of annual rules. GAO might keep the best figure of “substantive” rules. In 2013, they recorded 876 “substantive” rules, but many of these might not impose costs or paperwork hours.
14. You note that certain rules promulgated to implement the Affordable Care Act will impose an additional \$6.1 billion in costs.

Do you happen to know the total amount of benefits these regulations will generate? Based on our calculations from a review of more than 150 Affordable Care Act regulations, the law will impose \$6.8 billion in annualized costs and \$2.6 billion in annualized benefits. However, it is important to note that benefits in the health care field are notoriously difficult to quantify. Several rules engage

in “break-even” analyses, that is, what would the monetized benefits have to be to justify the costs.

15. Should Congress, in devising legislation dealing with the rulemaking process, ignore the benefits of regulations?

It is my understanding the legislation would address the benefits of past regulations. The proposed committee would analyze “rules to the economy [that] are not justified by the benefits to society.” This is obviously a difficult process, but rules with high net benefits would likely remain unaltered by the Commission’s activities. Rules with little, to no net benefits would be amended.

16. Professor Levin suggests that a better model for a retrospective review Commission would be to limit the subject matter area scope of its review and select Commissioners with expertise and experience in that particular area. He also suggests that the Commission make recommendations to the agency responsible for the regulatory program at issue.

What is your view of Professor Levin’s suggestion? As I stated above, subject matter expertise might be helpful, but it should not be an absolute requirement for Commissioners. Again, issue area experts are not always competent program evaluators. Congress routinely asks GAO and CBO to analyze policy, even though some staffers might not possess superior subject matter knowledge. Furthermore, limiting the scope of the Commission would obviously hinder its impact and its ability to amend past rules. This might be politically expedient, but it is not the best public policy. The OECD recommendations say nothing of a limited scope for retrospective review. On the contrary, OECD wants “systematic programme reviews of the stock of significant regulation.” Limiting review could also mean leaving rules that cause environmental damage in place. For example, EPA has issued rules in the past that the agency admits will cause \$52 million in environmental “disbenefits” (77 Fed. Reg. 59,459). Finally, I endorse Professor Levin’s recommendation that judicial review should be a component of regulatory reform. Agencies are already supposed to conduct retrospective review, but all we have seen are a few notable reviews, and dozens of superfluous regulations that do not “look back” at the success or failure of past rulemakings.

Response to Questions for the Record from Ronald M. Levin, Professor, William R. Orthwein Distinguished Professor of Law, Washington University School of Law

**Questions for the Record from
Ranking Member Hank Johnson and Representative John Conyers, Jr.
for the Hearing on H.R. ___, the “Searching for and Cutting Regulations that are
Unnecessarily Burdensome (SCRUB) Act of 2014”**

February 11, 2014

Responses submitted March 28, 2014

Questions for Professor Levin

1. **At several points in the bill, the term “costs to the United States economy” appears, but it is not defined.**

Does the term include “transfer” rules, i.e., rules that simply involve federal money flowing to nonfederal entities such as:

Medicare/Medicaid payments?

Food stamps?

Crop subsidies?

Presumably, the actual spending involved in programs of this kind is not the kind of “cost” that the bill contemplates when it refers to costs *to the economy*. That phrase seems to refer to the perceived disadvantages of a given rule, not its inherent price tag. On the other hand, the bill might be construed as empowering the Commission to order repeal of a transfer rule if it concluded that the rule *does* result in adverse consequences for the U.S. economy, such as by increasing the national debt.¹

2. **On page 10, the bill uses terms such as “excessive compliance costs” and “excessively burdensome.”**

What is exactly meant by these terms?

Doesn’t the assessment of “excessive” involve a matter of subjective intent?

Yes, “excessiveness” is surely in the eye of the beholder. The terms do not have a recognized specific meaning in public law.

3. **On page 13, the bill requires the Commission to review a rule that is “identified by the public.”**

¹ SCRUB Act §§ 101(h)(2)(B), (I).

So if the Mercatus Center identifies 1,000 rules that it believes should be reviewed, would the Commission be required to examine each of these rules?

Similarly, would the Commission be required to examine the 1,000 rules identified by the Heritage Foundation, in addition to the 1,000 rules identified by the Chamber of Commerce, in addition to the 1,000 identified by the National Federal of Independent Businesses?

Administrative agencies are expected to accept suggestions from the public when they engage in retrospective review of existing regulations.² Likewise, if an external body is to play a role in such review, I think it should also permit members of the public, including well-known interest groups, to make suggestions. The draft bill instructs the Commission to “conduct a review” of such suggestions and take action “if appropriate.”³ This provision does not seem to impose significant constraints on the Commission’s ability to winnow down the list of suggestions it receives. Even if standard administrative law principles would apply, courts allow agencies wide latitude to set priorities in the use of their finite resources.⁴

In my view, the main concern about interest group influence on the Commission is that such groups would probably exert considerable influence on the selection of *the commissioners themselves*. On each side of the partisan divide, powerful interest groups would probably demand and get a seat at the table or at least a veto over their side’s choices. This risk is one reason why the appointment of commissioners should be subject to senatorial confirmation and should not be turned over to legislative leaders, even if the Appointments Clause did not require these safeguards (which it does).

4. **Page 15 of the bill states that the Commission is required to “identify the annual cost of the rule,” but is silent about the rule’s benefit.**

**Thus, if the annual cost of the rule is \$20 million, but its benefits are \$200 million, is that relevant to the Commission’s analysis?
Should it be relevant?**

Certainly a rule’s benefits *should* be relevant, along with its costs. Some of the criteria that the Commission could invoke do entail a comparison between costs and benefits. But the

²ACUS Recommendation 95-3, *Review of Existing Federal Regulations*, 60 Fed. Reg. 43,108 (1995) (“Public input into the review process is critical. The Administrative Procedure Act already provides in section 553(e) for petitions for rulemaking, which allow the public to seek modifications or revocation of existing regulations as well as ask for new rules.”).

³SCRUB Act § 101(h)(5).

⁴*Defenders of Wildlife v. Gutierrez*, 532 F.3d 913 (D.C. Cir. 2008) (“an agency’s refusal to institute rulemaking proceedings is at the high end of the range of levels of deference we give to agency action under our ‘arbitrary and capricious’ review”); see also ACUS Recommendation 95-3, *supra* (“[P]etitions should not be allowed to dominate the agency’s agenda. Agencies have a broad responsibility to respond to the needs of the public at large and not all members of the public are equally equipped or motivated to file rulemaking petitions. Thus, the petition process should be a part, but only a part, of the process for determining agency rulemaking priorities, both with respect to the need for new regulations and to review of existing regulations.”).

Commission would not be obligated to rely on those criteria. It could rely on others, under which benefits could be ignored.

5. **Page 16 requires agencies to repeal or amend rules recommended by the Commission within 60 days.**

Would such repeal or amendment require a rulemaking?

Should the agency be required – as per the Administrative Procedure Act – to publish such repeal or amendment in the Federal Register for public comment?

Would that process take more than 60 days?

What if such repeal or amendment requires congressional action?

Under the Act, the agency would have 60 days to complete a repeal and 120 days to complete an amendment. Either of these agency actions would require a rulemaking proceeding. However, if the agency has absolutely no discretion about how to proceed, as could be the case with a repeal, the agency might not actually have to allow notice and comment. It could argue that it is exempt from that requirement, because those procedures would be “unnecessary.”⁵ On the other hand, if the agency has some latitude about how to proceed, as might be the case with an amendment, it would have to allow notice and comment (unless some other exemption applies), and 120 days might be too short a period to allow for full public participation and deliberation. Moreover, after complying with the Commission’s directive, the agency might need to conduct notice and comment proceedings to adopt rules that would mitigate any disruptions to the overall regime that the repeal or amendment has brought about (perhaps in ways that the Commission, in the exercise of its inexpert judgment, failed to anticipate).

As the last part of the question suggests, the agency might have been required by statute to promulgate the rule that the Commission directs it to rescind. Upon taking action required by the Commission, the agency might then be in breach of its statutory obligations. Groups that had benefited from such rules could then sue the agency to force it to obey its legislative mandate, and the agency would need to find some way of reconciling these conflicting commands, assuming that such a middle path exists at all (which may not be so). Nothing in the draft bill requires the Commission to take account of these complications, or indeed to pay *any* attention to the substantive statute that the rules were designed to implement.

6. **Page 24 of the bill states that the Commission can be funded to up to 1% of unobligated funds or \$25 million, whichever is greater.**

What does “unobligated” mean?

⁵ 5 U.S.C. § 553(b)(B); see Juan J. Lavilla, *The Good Cause Exemption to Notice and Comment Rulemaking Requirements Under the Administrative Procedure Act*, 3 ADMIN. L.J. 317, 386-88 (1989).

Isn't it true that at the beginning of an agency's appropriations cycle, all of its funding is unobligated?

I do not believe I have sufficient familiarity with the intricacies of federal budgeting to answer this question reliably.

7. **Does the bill's retrospective review requirement apply to all rules, even the most mundane and technical?**

Would it apply, for example, to Coast Guard bridge opening schedules, which can number up to 1,000 a year?

Would it apply to FAA airworthiness directives?

As written, this provision of the bill does appear to apply to mundane and technical rules. The drafters may underestimate how numerous rules of that kind are. To be specific, a search of the Federal Register's search engine⁶ indicates that in 2013 the Federal Aviation Administration adopted 425 airworthiness directives. The Coast Guard published nearly 500 rules adjusting such matters as security zones for particular waterways, drawbridge schedules, or other special local regulations. Many of these rules were effective for only a few days, a few hours, or less.

To speak more generally, Professor Stuart Shapiro published an article in 2005 in which he studied all rules published in the Federal Register during a two month period. He found that nearly half (170 out of 392) were "rules with a narrow impact ... that did not involve the type of rulemaking typically discussed in controversies over regulatory policy," including "'airworthiness directives' from the Federal Aviation Administration; 'flood elevation determinations' from the Federal Emergency Management Agency; and 'clean air act permit actions' by the Environmental Protection Agency.'"⁷

8. **The bill only requires the Commission chair to have expertise in administrative law, which means the other eight members do not have to have such expertise.**

How would these Commission members be able to second guess the appropriate level of a carcinogenic contaminant in drinking water?

In my view they would not have adequate qualifications to do so. Even if one or more did have the requisite expertise in water pollution regulation, they would lack it with regard to equally specialized questions arising under other regulatory schemes that the Commission would be empowered to revise.

9. **Section 101(a) of the bill requires the Commission to only look for ways to repeal or weaken regulations.**

⁶ <https://www.federalregister.gov/articles/search#advanced>.

⁷ Stuart Shapiro, *Two Months in the Life of the Regulatory State*, ADMIN. & REG. L. NEWS, Spring 2005, at 12, 12-13 (2005)

Is the Commission, under the bill, prohibited from making recommendations to strengthen rules so that they are more effective?

Of the nine subparagraphs in § 101(h)(2), eight are clearly deregulatory in their thrust. Subparagraph (D) of § 101(h)(2) is at least arguably different. It authorizes the Commission to single out a rule or set of rules for repeal or amendment on the basis of “[w]hether the rule or set of rules is ineffective in achieving the rule or set of rule’s purpose.” Read literally and in isolation, it could conceivably authorize the Commission to take action against a rule that is too weak. Perhaps, however, a court would reject that literal interpretation by relying on contextual evidence such as the surrounding eight subparagraphs, the prefatory language in § 101(h)(2) (which provides that the stated criteria in that paragraph are to be used “[t]o identify which rules or sets of rules should be repealed or amended to lower the cost of regulation to the economy), the title of the Act, etc.

10. How would section 101(h)(2)(B), which requires the Commission to only consider the benefits to society “within the United States,” apply to greenhouse gas regulations?

Apparently this provision would authorize the Commission to recommend repeal or amendment of greenhouse gas rules without considering their impact outside the United States. This focus would be a departure from the approach that the executive branch uses to estimate the “social cost of carbon.” The currently governing document estimates impacts on a global basis, because “emissions of most greenhouse gases contribute to damages around the world even when they are emitted in the United States.”⁸

11. What are the ramifications of section 101(h)(4)(B), which allows less than a majority of the Commission’s members to eliminate or weaken major rules that are authorized by law and adopted after the constitutionally mandated process of notice and comment?

It is a sharp departure from generally recognized norms of public law. I cannot think of any other regulatory body in the United States, past or present, in which an outvoted minority has ever been authorized to take binding action on behalf of that body.

12. Why, in your opinion, do you believe the Commission envisioned by the SCRUB Act is constitutionally suspect?

According to the Appointments Clause of the Constitution (Article II, section 2, clause 2), the President

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint [all] Officers of the United States, whose Appointments are not herein otherwise provided for,

⁸ Interagency Working Group on the Social Cost of Carbon, *Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis*, May 2013, at 15, http://www.whitehouse.gov/sites/default/files/omb/inforeg/social_cost_of_carbon_for_ria_2013_update.pdf.

and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Under this clause, the members of the Commission envisioned by the SCRUB Act would *probably* have to be appointed by the President and confirmed by the Senate, because inferior officers must be “officers whose work is directed and supervised on some level by others who were appointed by presidential nomination with the advice and consent of the Senate.”⁹ The bill does not provide for Commission members to be subject to such direction or supervision.

But nothing turns on whether that test is met or not, because even if the Commission members were considered “inferior officers,” they would have to be appointed by the President, a department head, or a court of law. None of the Commission members except for the Chairman would fit that description, either. As I explained in my written testimony, that fact makes the unconstitutionality of the SCRUB Act an easy call under *Buckley v. Valeo*, 424 U.S. 1 (1976).

At the subcommittee’s hearing, Representative Smith disputed this reasoning by noting that the Constitution gives Congress complete freedom to decide what agencies to create and thus to decide what laws should cabin their authority. However, his conclusion does not follow from his premise. As Justice White wrote in *Buckley*:

Congress clearly has the power to create federal offices and to define the powers and duties of those offices ..., but no case in this Court even remotely supports the power of Congress to appoint an officer of the United States aside from those officers each House is authorized by Art. I to appoint to assist in the legislative processes.¹⁰

13. Why should the Commission’s members have expertise in administrative law and be politically accountable?

Rulemaking frequently requires expertise not only in technical subject areas such as science, medicine, and engineering, but also in the complex manner in which an individual rule fits into an overall pattern of regulation. If, as seems likely, most Commission members would lack such expertise with regard to most fields of regulation in which the Commission would have authority to intervene, its decisions would carry high risks of creating a regime that would be ineffective or incoherent.

Those who are charged with making important decisions about regulatory policy should also be accountable to the political process for the sake of democratic responsiveness. Agencies are subject to direct supervision by elected officials (the President as well as Congress); and, as a practical matter, they need to strive to maintain relationships with private interests, because regulatory systems thrive on cooperation.

⁹ *Free Enterprise Fund v. PCAOB*, 130 S. Ct. 3138, 3162 (2010), citing *Edmond v. United States*, 520 U.S. 651, 663 (1997).

¹⁰ *Buckley v. Valeo*, 424 U.S. 1, 275 (1976) (White, J., concurring in part and dissenting in part).

The Commission might or might not seek to honor the wishes of the electorate, but nothing in the institutional structure of the Act would exert pressure in that direction.

14. Although you say that the Commission would essentially have unchecked authority, does the congressional approval process set forth in the bill provide that authority?

It does not provide an effective check, for three reasons: (1) The Commission's decision would stand as proposed unless disapproved by a joint resolution, which is quite difficult to get, because it requires concurrence of the House, Senate, and President (or a veto override in each chamber). (2) The disapproval resolution cannot be amended. It must accept or reject all of the Commission's proposed amendments or revisions, no matter how many there are. Thus, Congress cannot make judgments about individual items. Proponents of the SCRUB Act, drawing an analogy to the BRAC system, deliberately intend to tie Congress's hands in this way. (3) Most significantly, passage of a joint disapproval resolution would only mean that the Commission's choices would not take effect immediately. Those choices would still be binding on the respective agencies over time via the cut-go process.

15. Why would it be impractical to assign a qualitative value to the costs of every new rule?

I assume that the intent of the question is to ask about "quantitative" values. The simplest and most direct answer can be found in President Obama's executive order on regulatory review, which states: "Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."¹¹ Even MasterCard recognizes that some of the most important things in life are priceless.

16. With respect to the current processes and procedures for retrospective review, you describe in your testimony the petition process pursuant to section 553(e) of the Administrative Procedure Act, which states that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

How often is this process utilized?

How does one qualify to be an "interested person"?

I have not seen any recent published figures on the prevalence of rulemaking petitions. A survey conducted for the Administrative Conference in the 1980s found wide variations among agencies: some received only a handful of petitions per year, while other agencies – including the Agricultural Marketing Service, the Food and Drug Administration, and the Environmental Protection Agency – each received an average of more than 200 petitions annually.¹²

¹¹ Exec. Order 13,563, 76 Fed. Reg. 3821, § 1(e) (2011).

¹² William V. Luneburg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1, 55-59 (1988).

The phrase “interested person” is not interpreted as a limiting term. In practice, it means “anybody.”

17. You state that the SCRUB Act’s requirement that an agency include in the final issuance of any new rule a plan for review within ten years of its issuance is “manifestly extravagant.” Please elaborate.

Although I believe that this requirement should not apply to any broad category of rules, even “major rules,” its imprudence is most conspicuous in relation to the following types of rules:

(a) Rules that the Administrative Procedure Act (APA) permits agencies to adopt without any notice and comment, because such proceedings would be “unnecessary.”¹³ Typically, this exemption applies when the rule is minor or technical, so that the public would not be interested in commenting on it. Agencies invoke this exemption in at least five percent of all rulemaking proceedings (or perhaps more),¹⁴ and controversy about those assertions is rare.

(b) Transfer rules such as those mentioned above in Question 1. These rules normally impose few if any compliance costs on the private sector.

(c) Rules that will exist only for a brief time, such as those discussed in Question 7.

(d) Rules that pertain to transactions regarding named parties, including rates, corporate structures, and corporate reorganizations. The APA definition of “rule” expressly includes these and other rules of “particular applicability.”¹⁵

18. You mention the fact that the Administrative Conference of the United States (ACUS) is currently planning to study the issue of retrospective review and to issue recommendations to enhance the process.

How does ACUS typically conduct such studies?

Does it employ a deliberative process?

Does it allow divergent interests to weigh in with their suggestions and concerns?

Can the public comment?

The ACUS process is highly deliberative and open. The Conference typically retains a consultant to prepare a study of a specified topic. Drafts of the consultant’s report are made

¹³ 5 U.S.C. § 553(b)(B).

¹⁴ See Ronald M. Levin, *Direct Final Rulemaking*, 64 GEO. WASH. L. REV. 1, 14-15 (1995) (citing Lavilla, *supra*).

¹⁵ 5 U.S.C. § 551(4).

available for public comment, as are drafts of the recommendation that the Conference will adopt. Members of the public can observe and, with permission, participate in meetings of the Conference and its committees, and the Assembly, which votes on the ultimate recommendation, is itself broadly representative of diverse points of view.

19. How much time should the Administration's efforts at retrospective review be given before Congress intervenes?

This question seems to assume that the Administration's efforts to date have been plainly inadequate, but I do not share that premise. Thus, I do not think it is helpful to ask how much more time the Administration should be given to pursue its present approach. Instead, I would ask whether Congress can devise a system for retrospective review that is a clear improvement over that approach. As my testimony makes clear, I do not consider the SCRUB Act an improvement.

20. Please elaborate as to why modeling the proposed Regulatory Review Commission on the Base Realignment and Closure Commission is inapt?

The BRAC Commission was not called on to make fundamental policy choices. The premise for setting up this system was that political actors widely agreed on the need to close military bases. The point on which they disagreed was *which* bases should be closed, a matter that Congress could not effectively address on its own because of local allegiances (closure of any particular base would be fiercely resisted by members from the affected locality).¹⁶ In contrast, the SCRUB Act would empower the Retrospective Regulatory Review Commission to second-guess virtually the entire range of policy issues that underlie federal regulation of our economy and our society. These issues go to the essence of political debate in this country and should not be turned over to an essentially unaccountable body of nine persons, especially persons with no particular qualifications other than their having been selected by legislative leaders.

21. What are some of the problems with the proposed "regulatory cut-go" requirements contained in title II of the discussion draft?

First and most fundamentally, the Commission, with its onesided mandate and flawed structure, could be expected to select for "cutting" many rules that should not be eliminated in the first place. Second, the injection of this additional dimension into agency rulemaking proceedings would unnecessarily complicate the process of adopting new rules, no matter how important or pressing those rules may be. This extra step would be detrimental to effective governance, especially at a time when agencies are operating under severe budget constraints. Third, the cut-go process requires agencies to quantify the costs of every new rule, no matter how minor. This task would often be inherently arbitrary and would itself be a drain on agency resources. Fourth, OIRA would be required to certify the accuracy of the agency's cost

¹⁶ Michael J. Teter, *Recusal Legislating: Congress's Answer to Institutional Stalemate*, 48 HARV. J. LEGIS. 1, 8-16 (2011); see *id.* at 42 ("The approach works only in those circumstances where Congress agrees both on the need to act and on the substantive action that should be taken, but recognizes that, for particular structural reasons, it cannot or will not act.").

estimates (but not those of the Commission, as to which the need for monitoring would be greater). This obligation would greatly expand OIRA's duties and could distract it from fulfilling its current functions.

22. Briefly, why is requiring Congressional approval of rules subject to the discussion draft's "regulatory cut-go" requirements problematic?

Primarily, because such congressional approval would often be impossible to obtain, or at best extremely difficult. If either chamber was unsympathetic to the rule, or for that matter to the statute that the rule would implement, approval would not be forthcoming. Even if both chambers were amenable in principle to supporting the agency's initiative, they would each have to vote to approve the exact text that the agency had adopted; there would be no room to negotiate a compromise, because amendments are expressly barred. All of these obstacles to enactment would be challenging under any circumstances; they would be especially so under conditions of exceptional polarization like those of our current era, in which the perspectives of the House, Senate, and President are widely divergent. Considering that the 112th Congress was the least productive in more than sixty years, and the 113th is on track to beat even that record, proponents of the SCRUB Act have little room to argue that the congressional approval feature would go far to ameliorate the damage that the cut-go requirement would bring about.